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October Term, 1961

No. ..587

LEO B. MITTELMAN,

Petitioner,

AGAINST

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed petitioner's conviction under 15 U. S. C. 77 (e) (a) (1) and for conspiracy to violate 15 U. S. C. 77 (x).

Petitioner was charged with participation in a mail fraud scheme in violation of 18 U. S. C. 1341 and 1342 under Counts 2-32 (J. 39a-50a).* [He was not charged

* Page references preceded by "J" are to pages of the joint appendix; those preceded by "G" are to the appendix of Goldberg and Reiber; and those by "R" to the filed transcript

with participation in the Count 1 wire fraud scheme (J. 36a-39a).] He was also charged in Counts 33-49 with substantive violations of the Securities Act of 1933 [15 U. S. C. §77e (a) (1) and §77x] and a conspiracy count (no. 50) (J. 50a-95a). Thirty-six of these counts were submitted to the jury. Petitioner was acquitted of thirty-four and convicted only under Counts 2 and 50 (J. 25a).

The sentence was imprisonment for five years on Count 2, imprisonment for five consecutive years and a committed fine of $10,000.00 on Count 50, suspension of the second prison term, and five consecutive years of probation (J. 30a).

The Opinions Below

The Court of Appeals' opinion is reported at 294 F. 2d 928. A copy is hereto annexed (*infra*, p. 65). The Court of Appeals' *per curiam* opinion on the application for rehearing is not yet reported. A copy is hereto annexed (*infra*, p. 66).

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on August 22, 1961.

(ii) Timely petition for rehearing was filed and denied on November 6, 1961.

(iii) Jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented for Review

1. Whether the Court below erred in approving the refusal of the Trial Court, and of the District Court on a motion made before trial, to dismiss Counts 2 and 50 of the indictment, particularly because of the incorporation in Counts 2 and 50 of the allegations of Count 1 with respect to the unlawful acquisition of control of Texas-Adams Oil Co. Inc. (Texas-Adams).

2. Whether the Trial Court should have dismissed Count 50 because the term "public offering" in Section 4 (1) of the Securities Act of 1933 is too vague and uncertain to support a criminal accusation.

3. Whether the Court below erred in refusing to set aside petitioner's conviction under Count 2, where such conviction is necessarily inconsistent with the verdict of innocence with respect to Count 12.

4. Whether the court below erred in sustaining the rulings of the trial court which:

a. Admitted or refused to strike the testimony of witnesses previously interviewed by the prosecutors, despite proof that the latter had made contemporaneous notes of such interviews, that such notes reflected statements of the witnesses with substantial accuracy, that they were subsequently altered by deletions and interpolations and transcribed to witness sheets, and that they were destroyed after such transcription on the grounds that they were not entirely and exclusively verbatim, and that the prosecutors were not agents of the Government within the meaning of Sec. 3500; and

b. Denied defense access to such witness sheets on those grounds.

5. Whether the Court below erred in sustaining the trial court's charge with respect to character testimony.

6. Whether, after reversing the conviction of the three broker defendants and dismissing the indictment as to them, the Court below should not also have reversed the conviction of petitioner because prejudicial evidence was received against him which would not have been admissible but for the presence of said broker defendants in the case as alleged co-conspirators.

7. Whether petitioner had a fair trial:

(a) Where the prosecutor made serious accusations against petitioner to the jury in his opening statement inconsistent with facts which could easily have been ascertained, and did not withdraw those accusations after attempting and failing to prove them;

(b) Where the trial court pursued a course of harassment, repression and denigration of petitioner's counsel which impaired petitioner's right to fearless representation;

(c) Where the prosecutor knowingly adduced false testimony prejudicial to petitioner.

(d) Where the prosecutor falsely claimed surprise by the testimony of a Government witness, to secure the right of cross-examination; where he was permitted to incorporate in such cross-examination conflicting statements attributed to him by postal inspectors in an interview report the witness had not signed, and had previously repudiated; where he failed to call the claimed authors of the report as witnesses; and where such cross-examination prejudiced petitioner.

(e) Where the Trial Court admitted over objection collateral prejudicial evidence;

(f) Where the Trial Court accepted a plea of guilty from a co-defendant, refused petitioner's request for appropriate instructions in respect thereof, and, denied a post-verdict motion for a new trial based on jury misconduct in obtaining and using newspaper and other reports of that plea in violation of repeated instructions of the Trial Court.

(g) Where after a long trial, the Trial Court made serious misstatements of fact in its charge, and refused to entertain exceptions and requests to charge relating to the facts.

Statutes and Rules Involved

15 U. S. C. §77e. *Prohibitions relating to interstate commerce and mails.*

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U. S. C. §77d. *Exempted transactions.*

The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not

involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was *bona fide* offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was *bona fide* offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

15 U. S. C. §77x. *Penalties.*

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. §371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U. S. C. §1341. *Frauds and swindles.*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice, or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned no more than five years, or both.

18 U. S. C. §3500. *Demands for production of statements and reports of witnesses.*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such

statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule Involved

SECURITIES & EXCHANGE COMMISSION RULE 133

(Securities Act of 1933 Release No. 3522, October 26, 1954)

Rule 133. *Definition for Purposes of Section 5 of "Sale", "Offer", "Offer to Sell", and "Offer for Sale".*

For the purposes only of section 5 of the Act, no "sale", "offer", "offer to sell", or "offer for sale" shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in control, as defined in Section 368 (c) of the Internal Revenue Code of 1954, of such other person, under such circumstances that the vote of a required favorable majority (1) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (2) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

Statement of the Case

The mail fraud scheme set forth in Count 2 is based on the defrauding of Texas-Adams stockholders. Although none of the alleged conspirators had any contact with or even knowledge of that corporation until after August 9, 1955 (J. 1337a), the count alleges that the scheme was formed on March 18, 1955 (J. 39a). And the government was permitted to introduce evidence of many collateral matters which transpired in the interval. In effect, the government proved a scheme altogether different from the one charged in the indictment, namely, a plan, as stated by the Court below (*infra*, 2713) for "the acquisition of control of a publicly held corporation." The distribution scheme which forms the basis of Count 50 is a conspiracy to distribute stock for which no registration statement had been filed, though it should have been.

Crosby, McCarthy, and one Pettit were charged in Count 1 of the indictment with having defrauded the Texas-Adams stockholders by accomplishing the purchase of control by the use of Texas-Adams money (J. 36a-39a) and were convicted (J. 25a). Petitioner was not named in this count (J. 1a). Nevertheless, the evidence and exhibits (e.g. 18A and 18B) relating to these matters were received against him, over objection (J. 157a, 158a, 211a, 331a-333a).

On pre-trial motion and at the trial petitioner moved for dismissal of Counts 2 and 50 for duplicity, repugnancy, and because they failed to satisfy the requirements of Rule 7(c) of the Federal Rules of Criminal procedure that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The motions were denied.

In the memorandum submitted by the government in opposition to petitioner's pre-trial motion to dismiss the

indictment because of the improper inclusion of the Count 1 transactions in the counts relating to him, the government took the position that petitioner had joined the conspiracy "and adopted the acts of the participants in the prior scheme"—to wit, the Count 1 conspiracy scheme. However, no evidence was adduced that petitioner had any knowledge of the improper method of obtaining control of Texas-Adams referred to in that Count, much less that he ever adopted it.

The Government's Opening Statement

The prosecutor (R1-60) promised to prove that petitioner was a member of the Texas-Adams management subsequent to September 22, 1955; that he was responsible for false representations which were made to the public; that he gained control of Texas-Adams in concert with the other individual Count 2 defendants; and that in other transactions alleged to be related to the Texas-Adams conspiracy he reaped a wrongful profit of 1,800,000 shares of stock and embezzled $19,000 (J. 143a-145a). In its supplemental brief in the Court below the government sought to minimize the impact of these charges in the opening by noting that no attempt was made to prove the accusations at the trial. But it did introduce evidence from which an inference could have been drawn of the truth of the charges (see J. 347a, Exhs. 39B1 to B4), and the government left it to petitioner to disprove the same through cross examination (see J. 568a, 569a) and as part of his own case (see J. 1753a, 1759a).

Later discussion of the evidence will show that these were reckless and irresponsible misstatements.

The Evidence

The case against petitioner rested in large part on the testimony of seven co-conspirators (Jannis, Graham, Pittera, Moy, Rosen, Lynch and Kimmes) and at least four other witnesses whose testimony involved perjury. A case resting on such testimony is "weak" as a matter of law. (See cases cited in *United States* v. *Antonelli*, 155 F. 2d 631, 646).

Petitioner is a lawyer who was vouched for by an impressive array of character witnesses: Charles Abrams, former Rent Administrator (J. 1799a-1800a); A. Joseph Geist, member of the Board of Higher Education of the City of New York and of the Character Committee in the Second Department (J. 1771a-1776a); William J. Horrigan, of Dean, Magill, Huber & Horrigan (J. 1797a-1798a); Edward F. Huber, of Naylon, Foster, Dean & Aronson (J. 1802a-1804a); Paul D. Miller, of Mudge, Stern, Baldwin & Todd (J. 1794a-1796a); William F. Purcell, of Wein, Lane, Klein & Purcell (J. 1789a-1792a); Nathan Wartels, of Crown Publishers (J. 1792a-1794a); and others (J. 1804a-05a). These witnesses had known petitioner for more than twenty years, except Mr. Miller who had known him only eleven or twelve.

Petitioner had, in the summer of 1955 acted as attorney on behalf of a syndicate headed by defendant William J. McCarthy and three persons not named in the indictment. The syndicate was formed to purchase the very valuable Ajax Oil properties (J. 329a). Petitioner was given "a participation as part payment for his services" (J. 1724a).

The owners of Ajax were willing to accept in payment of the property cash and stock in a company whose stock was readily saleable.

During the course of the Ajax negotiations McCarthy met one Paul R. Jones, named as a co-conspirator (but neither indicted nor called as a witness), who stated in a letter dated July 22, 1958 that, through various companies which he had promoted and controlled, and would promote and control, he could furnish the necessary cash for the Ajax deal (Ex. M55B). In the meantime, the McCarthy syndicate had executed a contract for the acquisition of control of Dumont Marine and Instrument Co. Inc. (Dumont) (Ex. 38).

Thus the means for purchasing the Ajax properties seemed solved.

Jones' center of operations was in Denver, Colorado (J. 381a-3a, 869a) although he lived in Birmingham, Alabama; and the Ajax principal place of business was in Billings, Montana (J. 593a). Jones arranged meetings for McCarthy and Petitioner in Denver with his associates—Holland, President of Homestead (a Jones' controlled company); Branch, its Attorney; and Carroll, its Underwriter, who was also a co-promoter with Jones of Homestead, and the prospective underwriter of the other Jones companies.

The consequence was an agreement (Ex. 38) to merge Homestead with Dumont; acquire the Ajax property in the name of a newly created company to be known as Sundown Oil Company of Colorado; and then to merge Sundown into Dumont. When these arrangements were agreed upon Homestead advanced $50,000.00 for the first down-payment on the anticipated Ajax purchase. Petitioner and McCarthy then went to Billings (J. 593a) and reached an agreement with the Ajax people, after a full disclosure to Ajax' attorney of the arrangements made with Homestead and Dumont to make the purchase with Dumont stock to be used as part of the purchase price (Ex. 47a).

When petitioner arrived back in New York he learned that the Dumont principals had backed out of the deal.

McCarthy then met one Fassoulis (J. 1712a-13a), who represented that he had just completed arrangements to acquire control of a listed public company—Continental Car-Na-Var. Fassoulis and his attorneys, Simpson, Thacher and Bartlett made an independent investigation of the worth of the Ajax properties, and Fassoulis decided to join forces with McCarthy and Jones (J. 1716a-17a; 1727a-8a). Again petitioner went to Denver and Billings and reconstituted the deal with Continental in place of Dumont as the vehicle for the merger. And Fassoulis advanced $50,000.00 (J. 1736a) toward the Ajax purchase. Petitioner then went to Chicago where he met Ajax' attorney, and together they, having been empowered so to do, executed the purchase agreement by which Sundown was to acquire the Ajax properties subject to defeasance in the event of failure to meet the partial payments at the stated intervals provided for in the agreement (J. 574a-5a, 1728a-9a, Exs. 47A and 47B).

But now Jones failed to keep his commitments to McCarthy and Fassoulis (J. 924a-7a, 929a), and a default resulted under the terms of the Ajax agreement in consequence of which Homestead and Fassoulis suffered substantial financial loss; and petitioner the loss of a great deal of time and effort.

So far as petitioner was concerned he had no further interest in the matter. But this was not the end. McCarthy subsequently joined force with defendant Crosby, and they attempted to pick up the Ajax pieces, and thereby hangs the tale; and the subsequent involvement of petitioner in their affairs.

Texas-Adams first came into the picture in August 1955 after one of the convicted defendants, Crosby, and one Rosen, an alleged co-conspirator, had placed an advertisement in the Wall Street Journal seeking to obtain the controlling interest in a publicly held corporation (J. 1337a, 1352a). In this way Crosby and Rosen met defendants Gordon, Goldberg, and Reicher (whose convictions were set aside by the Court below for insufficiency of proof). McCarthy became involved in the purchase which was consummated on September 27, 1955 (J. 185a, 223a, 36a).

After acquiring control of Texas-Adams the Crosby-McCarthy-Pettit group sought, with the aid of Thomas K. Hudson, an officer, director and general counsel to the company, to acquire various properties (J. 885a; 892a; 1166a; 1311a; and 1434a). In the course of this program of acquisition and merger the volume of Texas-Adams stock was greatly increased. The government claimed that some of this stock was issued without consideration, and that much of it was issued under circumstances which required a registration statement. It was conceded that none was ever filed.

Petitioner became one of the New York attorneys for Texas-Adams for a limited purpose on October 19, and again November 1, 1955 (J. 680a-1a, 690a). After November 16, 1955 he acted as attorney for the company in New York (J. 1798a). Thomas K. Hudson, Esq., of Denver, Colorado, was its general counsel (J. 971a). Prior to November, 1955 Texas-Adams was represented in New York by Messrs. Annenberg & Greene and by them alone (J. 851a). They had been defendant Crosby's attorneys for several years prior thereto (J. 835a).

Crosby, McCarthy, and one Pettit were charged in Count 1 of the indictment with having defrauded the Texas-Adams stockholders by accomplishing the purchase of control by the use of Texas-Adams money (J. 36a-39a) and were convicted (J. 25a). Petitioner was not named in this count (J. 1a). Nevertheless, the evidence and exhibits (e.g. 18A and 18B) relating to these matters were received against him, over objection (J. 157a, 158a, 211a, 331a-333a).

According to a memorandum submitted by the government in opposition to petitioner's pre-trial motion to dismiss the indictment because of the improper inclusion of the Count 1 transactions in the counts relating to him, the government took the position that petitioner had joined the conspiracy "and adopted the acts of the participants in the prior sheeme"—to wit, the Count 1 conspiracy. However, no evidence was adduced that petitioner had any knowledge of the improper method of obtaining control of Texas-Adams referred to in that Count, much less that he ever adopted it.

The opinion of the Court below (*infra*, 2685, 2696) refers to the proof relating to the period "before the principal 'management' defendants obtained control of Texas-Adams", and it discusses the sufficiency of the evidence against petitioner under the heading "The 'Management' Defendants." It thus plainly implies a finding that he was a member of Texas-Adams' management. There is no support in the record for that finding.

On the contrary the record proves: that petitioner was not a party to the "Crosby-McCarthy-Pettit Joint Venture", which contemplated the Count 1 transaction (see Exs. 18A, 18B); that he did not participate in its negotiation or consummation, even as counsel (see J. 181a, 210a, 268a, 282a); that he did not participate as counsel

or otherwise in the Osage Mining Company transaction, described by the Court below as "perhaps the most artful example of the McCarthy stewardship of Texas-Adams"; that later when he became counsel for Texas-Adams he challenged the transaction for substantial failure of consideration, and took an adversary position against American Montana (a Crosby-McCarthy controlled company) which had benefited from the transaction (see Ex. M 24B); that he was never an officer or director of Texas-Adams, except only for the single instance when he acted as its signatory officer to protect a $100,000 loan (J. 1460-61a); that he did not initiate or participate in the negotiation of any of Texas-Adams' acquistion transactions: Homestead, (see Ex. 43A), Longview (J. 813-818a, 823a, 831a), Osage (J. 887), Taylorcraft (J. 953a), U. S. Sulpher (J. 1325a), or Comigu (J. 1435a;) and that he did not participate in the preparation or distribution of the brochure or its accompanying financial statements (see J. 1531a, 1533a).

Significant in this connection is the testimony of one Mauro, a government witness (J. 943a), who had dealings with several of the convicted defendants who allegedly represented Texas Adams (J. 947a). He had been given a list of its directors, which did not include petitioner (J. 949a), and he had never heard of petitioner as part of the management (J. 971a). Mauro further testified that his only contact with petitioner was when the latter acted as attorney for Texas-Adams to try to stop the sale of some collateral (J. 983a, 984a). And Jannis, a co-conspirator and a most important government witness, who was the all around handy man for Crosby, and who was used by Crosby and McCarthy as a conduit for the illegal sale of Texas-Adams stock, testified that petitioner was not a member of the controlling group for which he had acted (J. 692a; Ex. 60A).

This but provides a thin background to the case which became more and more complex and confused as the trial unfolded. The evidence overflowed the indictment, and frequently got lost in dead ends.

The Evidence Relating to Petitioner Under Count 2

This mail fraud count (J. 39a-50a) contains 18 alleged misrepresentations with regard to Texas-Adams (J. 47a, 48a). The mailing there referred to was of a Report to Stockholders (J. 49a, 50a). The same report formed the basis for Count 12 (J. 57a), of which petitioner was acquitted (J. 25a).

The report (Ex. 32A Ga & Ex. 106) was mailed by the brokerage concern (Ex. 32E), the members of which were acquitted by the Court below. There was no evidence connecting petitioner with any knowledge of what the report contained. It had been prepared by one Lynch after a draft had been sent (pursuant to McCarthy's instructions), to Annenberg (Texas-Adams' regular counsel) (J. 1526a)) and to defendants Goldberg and Gordon (J. 1486a-1487a).

While the government attempted to link petitioner with a "market letter" through one Robbins (J. 727a), the witness' bias was established on cross-examination (J. 754a-758a). It appeared, moreover, that petitioner was merely present when McCarthy read to himself, and not aloud, Robbins' notes (J. 763a, 764a). However, this market letter was not mailed out (J. 731a). It can have no significance in the case.

The government also sought to connect petitioner with balance sheets included in a brochure (Ex. 32D-1) sent to stockholders (J. 1493a). This formed the basis of Counts 24, 26, 27, 30 and 32 (J. 66a-72a, 236a). But

petitioner was acquitted of those counts (J. 25a) while Meredith was found guilty on them (J. 25a). Lynch, who prepared the brochure, said he never conferred with petitioner, and attributed his information to McCarthy, Hudson, Holland, Hershfield, May, and Gully (J. 1490a, 1492a, 1494a-1503a, 1528a-1534a).

Lynch testified that he had sent drafts of the brochure to several persons at the instruction of McCarthy, one of them being Hudson, but that he had sent none to petitioner (J. 1531a).

Lynch testified that he got a copy of the balance sheet (Ex. 97D) from Meredith (J. 1492a) and a later one (Ex. 163B-2) from Lubin, the Texas-Adams accountant (J. 1499a, 1500a). While Lynch testified at first that petitioner came with Lubin to his office, he said there had been no conversation about it then except with McCarthy (J. 1500a, 1501a). Moreover, Lynch had testified before a grand jury (J. 1533a) that it was Meredith who had accompanied Lubin (J. 1534a), and on cross-examination admitted he could not be sure that petitioner had come to his office (J. 1534a).

The connection of petitioner with any scheme to defraud rests, therefore, basically only on his association with McCarthy and his having acted for him in various enterprises. Under such circumstances the various errors we submit were committed at the trial assume decisive importance.

But the government sought to link petitioner to the schemes of Crosby, McCarthy, and Pettit by showing that he had been associated with one or more of them months before Texas-Adams had ever been heard of.

This proof goes to the date March 18, 1955, stated in both Counts 2 and 50 to have been the starting point of the Texas-Adams schemes. But that date, the organization of Homestead Oil and Uranium Co. by Jones, Holland, Branch and Carroll (J. 1540a, 1542a), has no relevance whatever, since none of the alleged conspirators was involved in its organization.

When the Government sought to develop this aspect of the case petitioner's counsel objected, and there was discussion in the absence of the jury (J. 331a-335a). This discussion related to a memorandum which the Government had served in advance in which it claimed that the "Homestead" evidence (which, as it turned out, was destined to take in all the complicated negotiations involving Jones, Carroll, Fassoulis, Stratford Factors, Dumont, Continental Car-Na-Var, Sundown, Holland, Branch, Gold, Ajax and Homestead itself--days and weeks of largely irrelevant and prejudicial evidence), would prove the falsity of at least five of the Texas-Adams alleged subsequent representations; petitioner's involvement in transactions similar to the fraudulent Count 1 transaction, petitioner's motive for joining the Texas-Adams fraudulent scheme, and petitioner's criminal intent.

The memorandum went on to state that "the evidence shows that securing control of Texas-Adams was the consummation of the Mittelman-McCarthy plan to gain control of a company or companies as a vehicle in acquiring Ajax", and that "the evidence will show that this had been their plain design during the summer of 1955."

But that plan is not the scheme alleged in Count 2 nor is it part of the conspiracy alleged in Count 50. It was lawful on its face. It was conceived and pursued before either of them knew that Texas-Adams existed; and therefore it was not and could not have been part of the Count

2 scheme to defraud Texas-Adams stockholders, or the Count 50 conspiracy to issue Texas-Adams stock unlawfully.

And this violent departure from the indictment was adopted in the charge. The Trial Judge told the jury (G. 283a):

> "* * * The Government claims that conspiracy had been formed by some of these defendants, and that their efforts during the summer of 1955 to acquire a vehicle for their purposes had been frustrated."

Petitioner's counsel objected strenuously to the Homestead evidence on the ground that there was no basis for the introduction into the record of testimony relating to transactions antecedent to the acquisition of control of Texas-Adams; that the transactions as alleged in the filed memorandum involved serious charges against petitioner; that such charges were collateral to the issues in the case; they were bound to have serious prejudicial effect; and that no basis for their admission had been shown by the memorandum.

Nonetheless the Government was permitted to proceed.

Do the transactions reflecting the attempts to purchase the Ajax property bear any resemblance to the fraudulent Texas-Adams *take-over* in design or purpose?

Did petitioner defraud Homestead in any way, and did his actions in connection with Homestead establish motive and intent to join a conspiracy with McCarthy and Crosby?

The answer to the first question depends upon an analysis of the two separate attempts of the McCarthy syndicate to purchase the Ajax property, first through the

medium of Dumont and then, when that failed, through the medium of Continental.

The answer to the second question depends upon an analysis of four transactions involving (a) the transmittal of $50,000 to the firm of Parker, Chapin and Flattau; (b) $19,000 to petitioner; the purchase of 1,800,000 shares of Homestead stock by petitioner; and an alleged loan by Homestead of $[illegible],000 to petitioner.

It is plain enough that McCarthy had found a bargain which justified energetic purchase efforts and a substantial resale profit. As Holland admitted, the Bonanza and Poplar Fields were "fabulous". Homestead checked the Ajax properties and "the potential looked very exciting," and "it was a very good deal" which "anyone" would be "anxious to get into" (J. 465a).

In his preliminary negotiation with respect to the purchase to the Ajax property, McCarthy discovered that it was possible to purchase the property with cash and or cash and stock in a company whose stock was readily saleable.

On July 19, 1955, McCarthy's syndicate signed a formal agreement with Stemmler, the President and Chairman of the Board of Dumont, to purchase the controlling block of stock in that company (Ex. 38). The obvious purpose was to have a vehicle capable of issuing shares of stock for part of the purchase price a fact fully disclosed to Stemmler. McCarthy had previously met Pam R. Jones, a named co-conspirator of paramount importance in the Homestead transaction (Exs. MS; G, 537a, 540a, 560a) and the later Osage plot, who was never called to the witness stand by the Government. Jones represented to McCarthy that he was in a position through companies controlled and or which would be controlled by him to furnish

the requisite cash for the other part of the purchase price of the Ajax property (Ex. M 55B).

An agreement was then entered into between the Jones and McCarthy interests (Ex. 38). The agreement provided for the creation of a corporation (Sundown) to act on behalf of all the parties in the purchase of the Ajax properties. Sundown was to be a wholly owned subsidiary of Dumont, and Homestead was then to be merged into Sundown. In this agreement and because of it Homestead advanced $50,000 to be used as a down payment on the Ajax purchase by Sundown. A contract was then made between Ajax and Sundown (Ex. 47A) for the purchase of the Ajax properties.

At this point we pause to point it that there was nothing in the arrangements made between Dumont, Homestead and Ajax which in any way contemplated the sale of stock to the public. The transaction was legal in all respects. McCarthy had worked out an ingenious plan to acquire the Ajax properties on terms satisfactory to all the interested parties.

It is obvious that there was nothing about this transaction which in any way resembles the fraudulent takeover of Texas-Adams by McCarthy and Crosby. There is not the slightest indication that the parties contemplated looting the treasury of any of the companies involved in the transaction, or in offering worthless unregistered stocks for sale. Only purblind prospectors, gifted with hindsight could perceive an evil intent in petitioner's activities in preparing the necessary papers in connection with the plan.

When the Dumont transaction failed, McCarthy was able to interest a Mr. Fassoulis in joining forces with him. At that time Fassoulis was negotiating an agreement to purchase control of Continental Car-Na-Var, a company

listed on the American Stock Exchange. There then followed negotiations with the end result that agreements were entered into which resulted in the substitution of Continental for Dumont as the vehicle for ultimately acquiring the Ajax property. Both Homestead and Ajax consented to the change and petitioner did the legal work necessary to carry out the agreements among all the parties.

Unfortunately, Mr. Jones was unable to keep his commitments to raise the necessary cash to satisfy all the requirements of the Ajax and Continental acquisition. The result was, that though petitioner had closed an agreement for the purchase of the Ajax property, a default resulted under its terms, and that transaction, likewise, met with failure. Both Fassoulis and Homestead suffered financial loss in consequence, and petitioner had spent and wasted a great deal of his own time in connection with this venture.

It is necessary to point out again that there is not the slightest evidence in any of the agreements entered into between Homestead, Continental and Ajax, which contemplated the sale of stock to a deluded public for the purpose of acquiring the Ajax property.

We turn now to an analysis of the activities of petitioner which the Government said proves motive and intent:

(a) *The alleged misappropriation of the $50,000.* It will be recalled that on July the 22nd, 1955 in connection with the first trip to Billings, Homestead advanced $50,000 to Sundown which was deposited in a Billings bank subject to withdrawal by Holland and petitioner.

Subsequently, when Fassoulis joined the venture and it was necessary by reason of the time schedule to pay $50,-

000 on account of the Ajax purchase agreement, he wired the funds to petitioner in Chicago upon the express understanding that the money would be returned to him by Homestead to make a payment on account of the Continental Car-Na-Var acquisition. Accordingly, Holland himself wired the funds at the request of Fassoulis to Parker, Chapin and Flattau, New York attorneys who were representing the controlling stock interest in Continental Car-Na-Var (J. 483a, Ex. 40B1; Exs. 40B2, 3 and 4; and Ex. 40B5, J. 484a).

(b) *With regard to the $19,000.* On August the 25th 1955, in consequence of urgent demand from Fassoulis, Homestead wired to petitioner $19,000 in order to help Fassoulis repay the $50,000 which he had borrowed in connection with the Continental Car-Na-Var acquisition. Pursuant to Fassoulis' instructions, petitioner turned over $15,000 to the lender who was pressing Fassoulis (J. 1753a; Exs. 39B1, 2 and 3). These facts were within the knowledge of the prosecution, or they could have been easily ascertained. Instead it was made to appear in the prosecutor's opening, and in the manner in which the case was presented to the jury, that petitioner had misappropriated this money.

(c) *The alleged embezzlement of the 1,800,000 shares of Homestead stock.* After the Dumont transaction had failed of consummation, the syndicate evolved a means by which it was hoped that the balance of the Homestead shares then unsold could be marketed. It was important and necessary from the standpoint of the Homestead group that the regulation A issue be terminated and a final report submitted to the S. E. C. To do this it was necessary to either abandon all efforts to sell the unsold shares, and to file a report to that effect; or, to close out the issue by means of a sale. The latter course was pur-

sued. And while petitioner was in Denver Carroll arranged that petitioner borrow from himself and from one Gold, a friend of his $90,000 in order to purchase the 1,800,000 shares of Homestead stock still unsold at the issuance price of .05c per share. The loan was made, the stock purchased and upon receipt of the proceeds of the purchase Homestead in turn loaned the $90,000 to petitioner to repay Carroll and his friend Gold (J. 538a-9a, 559a-63a).

This was all done because Jones, McCarthy and Fassoulis were certain that they could sell the 1,800,000 shares of stock in Birmingham, where Jones resided, and in New York where Fassoulis had his connections.

And so with full knowledge on the part of all the parties (J. 561a), petitioner left Denver for Birmingham and delivered 500,000 shares of the Homestead stock to Jones (J. 1741a) which he agreed to sell and to remit the proceeds of the sale to petitioner to repay Homestead (J. 1741a, 1745a-6a, Ex. M 55D). Petitioner returned to New York with 1,300,000 shares which he turned over to Fassoulis for sale (Ex. M 55D). Jones could not sell the 500,000 shares in Birmingham and returned them to McCarthy. Fassoulis, instead of selling the shares as he had agreed to do, pledged them as security for a loan from Stratford Factors, and thus the matter stood at the time the Ajax deal collapsed. Subsequently petitioner recovered the shares from Stratford Factors and turned them over to McCarthy.

Here again petitioner was compelled to go to great extremes to demonstrate that he had in no wise violated the trust reposed in him by his clients.

The suggestion, therefore, that petitioner was motivated by fear of criminal prosecution by Homestead is absurd.

This completes the Homestead story in so far as it meets the Government's alleged justification for its admission.

What is important to note here is that there was no evidence of probative value connecting petitioner's efforts with Texas-Adams and the Count 1 scheme. None of his communications to Homestead during that month of September mentioned Texas-Adams (Exs. 42A; B1-5 and C); and Ajax's attorney testified that he never heard of Texas-Adams until he met McCarthy and Hudson in Denver on October 11, 1955 (J. 600a-1a).

The Evidence Under Count 50

Petitioner's principal connection with the alleged conspiracy to market stock consisted of opinion letters he wrote in connection with the Empire Drilling Company, Comigu, U. S. Sulphur Co. and Jannis transactions. They stated that the various proposed stock issues were exempt from registration requirements.

There were two Empire opinion letters. The first (Ex. 136B, E. A. 406) was based on a contract (Ex. 130-C) which contemplated a deal whereby Texas-Adams was to purchase the assets of Empire for 150,000 shares and to issue additional shares to creditors and interest holders. The second (Ex. 143-D, E. A. 506) dealt particularly with these latter. While, in fact, Texas-Adams acquired Empire stock and not its assets, there is no evidence that petitioner knew, when he wrote his first letter, that there was going to be any change. And while there may be difference of opinion as to the technical correctness of the second opinion, it was not unreasonable for petitioner to believe that the stock issued to the interest holders would be freely transferable since at that time (before *SEC* v.

Culpepper, 270 F. 2d 241, 247-248) shares issued under Rule 133 were not considered restricted.

With respect to Comigu, petitioner wrote an opinion letter on the basis of the acquisition of assets (Ex. 168-B, E. A. 606). His views are confirmed by a letter written by one Gully to Hudson on February 1, 1956 (Gully Ex. 55a) (Gully was the seller and was acquitted—J. 25a) and by a Texas-Adams resolution (Ex. 168-C). Indeed, the Court below conceded that the Rule 133 exemption "probably" fit that situation (*infra*, 2700).

The U. S. Sulphur opinion letter (Ex. 148-B, E. A. 52b) was based on information obtained from Hudson. This transaction was negotiated in Denver by Hudson and McCarthy (J. 1325a-1330a). There is no basis for an inference that petitioner knowingly participated in any fraud. The Court below, however, stressed as "particularly damning" (*infra*, 2698) petitioner's letter of April 30, 1955 stating that 150,000 shares of Texas-Adams were being issued to a Canadian corporation in part payment of the purchase price of U. S. Sulphur. The fact is that Texas-Adams' directors adopted a resolution for the issuance of these shares to L. W. Limited (Ex. 148-C).

That corporation had been organized by Rosen (mentioned above in connection with Crosby) for a purpose wholly unconnected with Texas-Adams (J. 1379a, 1380a). When the purpose failed petitioner asked for the use of the corporation for his clients (J. 1381a). The record showed no disposition of these shares by L. W. Limited (J. 1591a) so that their issuance did not in any way contribute to any distribution scheme.

Harry A. Hershfield, U. S. Sulphur's president and one of its two stockholders, denied knowledge of or participation in this transaction (J. 1246a). But cross-examination

revealed him as a swindler and liar unworthy of belief (J. 1317a-36a). And the following facts impugn his denial:

First: At the time of Texas-Adams' initial purchase in February U. S. Sulphur was negotiating for additional and, Hershfield claimed, immensely valuable sulphur properties (J. 1323a, Ex. 147B, third page).

Second: These additional properties were not covered by the initial purchase agreement (Exs. 15A and B).

Those facts support two alternative inferences, consistent with the good faith of petitioner's opinion: that U. S. Sulphur transferred or purported to transfer additional mining claims as consideration, and that L. W. Limited was its nominee for tax or other purposes; or that Hudson and McCarthy made false representations to that effect.

Finally, there is the matter of George Jannis. Petitioner wrote three opinion letters on October 20 and November 1, 1955 (Ex. 56E, E. A. 20b; Ex. 57E, E. A. 22b; Ex. 57G, E. A. 24b). The first two justified the transfer of Texas-Adams stock in payment for loans and services. There was no evidence that petitioner knew the first two letters were based on falsehoods. Indeed the record supports the contrary.

It suffices to say now that the evidence proved: that Jannis was falsely represented as a Greek shipping magnate (J. 680a, *et seq.*; 876a, *et seq.*) that he signed the fraudulent documents mentioned in Exs. 56E and 57E; that the petitioner discovered his deception on November 3; that his subsequent conduct was consistent with his claim of good faith; and that he did not participate in or profit from Crosby's conversion of the 52,000 shares issued for merger purposes with Homestead (J. 1475a-9a; Exs. 60A and B).

The third dealt with the 1,300,000 shares of Homestead which had been issued to petitioner at the time of the Homestead negotiations (Ex. 45A, E, F) but which had been turned over to Fassoulis who had advanced a large amount of money (J. 1742a, 1759a, 1763a), in connection with the Homestead-Ajax transaction Fassoulis had wrongfully pledged these shares to Stratford Factors (Exs. 56E, 57E and 57G). Ultimately the stock was turned over to Meredith on McCarthy's instructions (Ex. 59C) after petitioner had recovered them from Stratford. Petitioner was acting on instructions of McCarthy and Hudson and recognized that they were entitled to dispose of the shares (See Ex. 59B, 59C). The naming of Jannis as the vehicle for their convenience was irrelevant.

It is significant, also, that petitioner was acquitted under Count 43 (J. 25a) which was expressly based on the Jannis stock (Ex. 191C). The Court below stressed the fact that petitioner sold stock for his sister which was in Jannis' name "long after he concededly knew the truth about Jannis" (*infra*, 2698). Those shares were part of Stratford's collateral, and it was threatening to exercise its clear right of sale; petitioner merely acted as Stratford's agent, to assure orderly liquidation; he told Stratford he would so through a nominee; and the proceeds were remitted to Stratford (J. 1477a-1479a).

The evidence showed that Crosby converted the 52,000 shares of Texas-Adams stock issued as above related. But petitioner did not participate in or profit by Crosby's conversion of the shares.

The Carroll Testimony

It has been established, has it not, that McCarthy could not have heard of Texas-Adams prior to August 9th (J. 1337a, 1352a, Gordon Ex. 18a) and he probably did not hear of it from Crosby until sometime later. The date was not important to the prosecution's case against McCarthy because it had established beyond peradventure that McCarthy had joined forces with Crosby in the take-over of Texas-Adams, and was a principal in the Count 1 fraud. In addition, he had pleaded guilty on the third day of the trial.

But would it not nail petitioner if it could be established that he had known of Texas-Adams during the Homestead negotiations? The courtroom drama and atmosphere must not be disregarded. A jury does not get the evidence in orderly fashion. Witnesses come and go; memory is short and grows hazy as time marches on, and facts do not always drop into their proper slots.

And so the witness Carroll is called to the witness stand presumably to testify in regard to the Homestead evidence. Under the expert guidance of the prosecutor he blandly testifies that at two meetings, one in New York and one in Denver (J. 523a-4a), McCarthy in the presence of petitioner told him that Texas-Adams was one of three companies that he controlled, and could merge it with Homestead.

The prosecutor knew this could not be true, and in the court below the government conceded that the testimony was "unquestionably wrong." And Carroll had been before the Grand Jury and had been interviewed by the prosecutor who had taken copious notes which were not made available to the defense. There can't be any question but that the prosecutors knew what Carroll's testimony was going to be.

The evidence bore on a vital issue in the case. How this and other prejudicial testimony affected the jury's judgment will never be known. But speculation is not due process when error prejudice and prosecution misconduct is so clear.

(Carroll's testimony will be found in the joint appendix at 518a; 520a; 522a. 523a, and 524a.)

The Trial Court's Attitude

Against this background the hostile attitude of the Trial Court toward petitioner's trial counsel assumes transcendent importance. This manifested itself early in the course of the trial and continued to the very end.

The Trial Court early in the trial, because of petitioner's trial counsel's exception to the tone used by the Court in an admonition (J. 448a, 449a), fined him $500 for contempt of Court, payable the next day, and threatened a remand (J. 449a).*

Other incidents were: arbitrary termination of cross-examination, and dismissal of an important government witness from Colorado (J. 561a-567a); violent insistence on cross-examination of another government witness from Colorado regarding the contents of certain exhibits before they were offered and received in evidence, and even after they were offered by the government and excluded upon objection by other defense counsel (J. 1227a-1233a); oppressive compulsion to study voluminous statements produced pursuant to 18 U. S. C. 3500 in the presence of the jury (J. 1033a-1036a, 1041a); adverse reflection on defense exhibits by receiving them without a glance (e.g.,

* The next day other counsel asked that the matter be reconsidered (J. 467a). Upon renewal later in the trial and after a statement by petitioner's counsel, the court withdrew the finding (J. 675a, 676a).

J. 1189a-1190a); unjust imputation of trickery in the formulation of questions addressed to an undisputed fact and obviously innocent of improper motive (J. 236a); harassing criticism of the quality, scope and length of important cross-examinations (J. 544a, 558a, 564a-567a, 1199a-1200a, 1202a-1204a, 1216a-1218a); numerous instances of unprovoked, angry and derogatory incivility; the request that petitioner's counsel "go at (his exceptions) fast," immediately after delivery of the charge at high speed for approximately 7½ hours, and without any opportunity for preparatory study (J. 1847a); and the flat refusal to hear any request to charge "if it has any reference to the facts," followed by total refusal to hear petitioner's counsel any further (J. 1847a-1848a, 1852a).

In addition an occasion arose where petitioner's counsel asked for a postponement of his cross-examination of the witness Rosen so that he could examine about 200 pages of grand jury testimony given by Rosen (J. 1358a). The Court suggested that the minutes be examined during the luncheon recess (J. 1359a). After that recess counsel stated that he had been unable to examine the minutes adequately (J. 1360a, 1361a). He suggested that Rosen be replaced by some witnesses from Colorado whose testimony would be brief, and the cross-examination resumed the next day (J. 1362a). The Court insisted on the minutes being read then and there (J. 1363a). During the course of the discussion the Court spoke of "baiting" on the part of counsel for Crosby and other defense counsel (J. 1364a). When counsel for this petitioner remonstrated on the reflection on his good faith as the first time such criticism had been made as to him by any court (J. 1364a) the Court replied "an investigation having to do with other members of this Court does not bear that out to be true" (J. 1365a).

How could petitioner have a fair trial under such circumstances?

The McCarthy Guilty Plea

Three days after the trial commenced defendant McCarthy pleaded guilty in the absence of the jury (J. 165a-169a, 196a-206a). Counsel for petitioner moved for a mistrial on the ground that what had occurred would prejudice his client (J. 204a). The Court denied the motion, but pointed out the "responsibility that goes with a free press" and said he would instruct "the jury not to read anything in the papers" (J. 205a). After acceptance of the plea counsel for various defendants, including counsel for petitioner, moved for a mistrial (J. 207a, 208a). Counsel for the government stated that the Court would admonish the jury not to read about the case in the newspapers or listen on the radio or television about it (J. 208a).

At the close of that day the Court instructed the jury not to read or listen or talk with anyone about the case (J. 227a). Counsel for petitioner then asked the Court to inquire on the following morning whether the jury had in fact heard anything, pointing out that it might be "unavoidable" that they had (J. 227a, 228a). Other counsel then objected and the Court declined to make the inquiry stating that it would cover the matter in its charge (J. 228a.). In the charge the Court said only that McCarthy was no longer in the case (G. 161a) and that guilt was personal (G. 331a).

In fact the Court's admonition was not heeded. The jurors did read the papers and listen to the radio and clippings were brought into the jury room (J. 1878a). Photostats of reports in the Times, Tribune, World Telegram and Journal-American are reproduced in the record (J. 1897a). The headlines in the World Telegram and Tribune feature McCarthy's plea.

The facts with reference to the jury's knowledge were learned from a chance meeting between petitioner's trial

counsel and one of the jurors (J. 1878a). The juror stated that the jurors believed that McCarthy "had in effect said the other defendants were also guilty" and that his plea had prejudiced them (J. 1878a). On the basis of this statement counsel for petitioner moved for a new trial (J. 26a, 1876a-1897a). The motion was denied (J. 33a).

The Court below considered this subject at length in its opinion. It said that the plea itself formed no basis for a mistrial since the jury was properly instructed (*infra*, 2719) and that the motion made after verdict was properly denied because the effect on the jurors of what they had read and heard could not be considered (*infra*, 2720). *Marshall* v. *United States*, 360 U. S. 310, was distinguished on the ground that the matter there improperly before the jury was "too inflammatory not to have affected the Jury" (*infra*, 2721) and that knowledge of the McCarthy plea was not of that character, largely because it might have been taken in the jury's presence (*infra*, 2722).

The Acquittal of the Broker Defendants

Petitioner in his application to the Court below for rehearing raised a new issue, occasioned by that Court's dismissal of the indictment against the three broker defendants. Pointing out that prejudicial evidence had been introduced that would not have been admissible had these defendants not been charged as co-conspirators, he contended that a new trial was imperative. The Court below ignored the contention in denying the application for rehearing.

One of the items of evidence which was bound to have a prejudicial effect on the jury had to do with matters which had no relation whatever to the schemes referred to either in Count 2 or Count 50, but which indicated that

the brokers had been involved in some difficulty with the S. E. C. in connection with the disposition by the brokers of the controlling stock of Texas-Adams which they had acquired (see J. 173a-76a, Exs. 9C and 9F1 and testimony of Frumberg R. 188ff). This evidence had been received over objection by petitioner's counsel "subject to connection" (J. 176a).

In the Court below the government took the position that the evidence was offered for the "limited purpose of establishing the brokers' knowledge" (Supp. Brief 26). But at the trial government counsel claimed it was knowledge "communicated to the defendants" (J. 175a, 176a). And the Court included this episode as evidence "that all of the defendants" knew these matters (J. 278a).

Still another item of evidence in the record because of these broker defendants in the case as co-conspirators involves the use of the Texas Adams seal by the Crosby group before it actually acquired control. The seal was necessary to accomplish the illegal acquisition purpose, and the government contended that it was fair to assume that the Gordon group had made the seal available (J. 138a-39a; J. 213a). As to this the Court below said:

> "The evidence that the buyers used a Texas-Adams' seal in implementation of the take-over fraud is far too weak a base from which to infer guilty knowledge on the part of these defendants. The gaps are too broad and substantial. To hold the defendants on this evidence, it must be inferred that it was 'the' seal, rather than a facsimile, that was used by Crosby * * *" (pp. 270-71).

It is not necessary that we quarrel with the Court below in its interpretation of the fact. But this matter was submitted to the jury for determination, and it is impossi-

ble to say how they reacted to the evidence which the government contended proved that the Gordon group aided the Count 1 defendants to defraud Texas-Adams in order to get paid for the controlling block of stock.

The Greenberg episode discussed (*infra*, p. 57), would not have occurred but for the presence of the three brokers as alleged co-conspirators.

The government's case against the brokers was built on a series of circumstances. The Court below rationalized each fact into immateriality. It is not necessary to say that the Court below was wrong. Assuming it was right, the fact remains that the testimony was extremely prejudicial to petitioner.

The Court below said, in discussing the broker defendants and it is worth repeating (*infra*, 2706-7):

> "It is always a difficult task in a complicated omnibus conspiracy case like this one to decide at what point the government has produced enough evidence against individual defendants to put their fates in the hands of the jury. Because of the tremendous potential for collateral prejudice inherent in these cases, however, the courts must be extremely scrupulous in sorting out the evidence against single defendants and weighing the same—divorced from the all too often damning influence of the background conspiracy. The case against these three defendants presents a peculiarly difficult problem in this regard because the prime issue is one of guilty knowledge and criminal intent. It is undisputed that the brokers' acts in fact furthered the conspiracy; the claim is persuasively made, however, that they were merely 'doing business as usual' and, to their best knowledge, according to acceptable standards of that business.

> The statutory and administrative regulatory scheme over this area is far from a model of clarity such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law."

Reasons for Allowing the Writ

1. The Court below, in sustaining the failure to dismiss Counts 2 and 50 for duplicity and repugnancy decided important questions of federal criminal law which deprived petitioner of his constitutional right to be "informed of the nature and cause of the accusation against him, and arrogated to the Courts and the Government the right to accuse petitioner of a crime—the exclusive function of the Grand Jury.

2. The Court below has decided important questions of federal criminal law in conflict with principles set forth by this Court in *Kottakos* v. *United States*, 328 U. S. 750, by upholding the validity of Counts 2 and 50 of the indictment notwithstanding the inclusion in each of them of prejudicial allegations relating to a scheme wholly unrealted to the basic schemes set forth in those counts and one with which this petitioner had no connection.

3. The Court below has decided an important question of federal criminal law which has not been and should be passed upon by this Court by its ruling that a criminal prosecution may be maintained for violation of the Securities Act of 1933 notwithstanding the vagueness of the term "public offering" contained in Section 4 (1) of that Act (15 U. S. C. 77d).

4. The acquittal of petitioner under Count 12 and his conviction under Count 2, both involving identical mailings, call for a consideration by this Court of the applicability to the case at bar of *Dunn* v. *United States*, 284 U. S. 390.

5. The Court below has decided an important question in the administration of federal criminal justice in conflict with the rationale of the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, and has interpreted 18 U. S. C. 3500 in a manner which opens the door to its nullification so that the matter should be passed upon by his Court.

6. The court below in sustaining the Trial Court's charge relating to character evidence has decided an important question of Federal Criminal Law. The Trial Court's charge invited the jury to consider facts not in evidence, and to speculate as to whether the character witness may not have been deceived by petitioner as to his true character, and warned the jury that the character witnesses were not themselves vouching for petitioner's good character, and in other respects was in conflict with the decision of this court in *Edgerton* v. *United States*, 164 U. S. 361.

7. The Court below, in refusing a rehearing after its reversal of the conviction of three of the defendants and the dismissal of the case as to them, has ignored principles stated by this Court because prejudicial evidence was received against petitioner which would not have been admissible had these three defendants not been charged as co-conspirators.

8. Under all the circumstances of this case—including prejudicial statements by the prosecutor in his opening,

the hostility of the Trial Court toward petitioner's counsel, the use of testimony by the prosecutor which he knew to be erroneous and later, but not before the jury, conceded to be such, the cross-examination by the prosecutor of one of his own witnesses, the receipt in evidence of a mass of unrelated testimony, particularly that relating to the Count 1 scheme with which petitioner was not connected, and the misconduct of the jury in relation to the McCarthy guilty plea—petitioner's trial was so unfair as to call for review by this Court.

Supporting Argument

I

Since petitioner was convicted only under Counts 2 and 50 we shall deal only with them. Count 2 charges the use of the mails in a scheme to defraud, primarily by the sale of stock of Texas-Adams upon misrepresentations of its value (J. 39a-50a). Count 50 charges a conspiracy to distribute stock which should have been registered with the S. E. C. but was not (J. 87a-95a). But into each of these counts certain of the allegations of Count 1 were incorporated (J. 40a, 88a). This count charged the use of an interstate wire message in a scheme to take over Texas-Adams by using its own funds for the purpose (J. 36a-39a). Petitioner was not charged with participation in that scheme. Yet the allegation from Count 1 included in the other two counts is that these unlawful means were used (by others than petitioner) to obtain control of that company (J. 37a-38a).

The issue of duplicity raised the basic question whether or not the Grand Jury intended to accuse petitioner Mittelman of participation in the Count 1 scheme, all of the essential allegations of which are *realleged by reference* in paragraph 2 of Count 2.

Contrary to the suggestion of the Court below (*infra*, 2710) this objection was in no sense technical, nor did it rest on any desire for needless repetition.

Article 6 of the Amendments to the Constitution of the United States provides the inflexible rule that in all criminal proceedings the accused must "be informed of the nature and cause of the accusation" made against him. No one can say that the indictment in this case is informative in that regard.

In substance Count 1 charges a scheme to obtain control of Texas-Adams in fraud of its then existing stockholders by using the funds of the corporation improperly.

Count 2 charges a scheme to defraud future purchasers by putting out false statements about Texas-Adams.

Count 50 charges a scheme to violate the Securities Act by selling securities without registering.

The Count 1 scheme is entirely separate from the others. There was no reason whatever for incorporating the gist of Count 1 in the other counts except with intent to prejudice. Had the persons charged in all the counts been the same it might be possible to argue that no harm was done. But since petitioner was not charged in Count 1, that contention is not possible. He necessarily was harmed by being linked with the Count 1 scheme by the back door, so to speak, and having all the evidence relating to it considered by the jury against him despite the fact that there was not a scrap of evidence that he had any connection with it whatever.

Moreover, the Count 1 scheme was completed before any of the acts which form the basis of the Counts 2 and 50 schemes were performed—before any mailings were had. And it affected a different class of persons who were not affected by the other two schemes.

In seeking to escape the horn of repugnancy the Government admitted in its opposing memorandum on the pretrial motion that there were two schemes, saying that after the Count 1 scheme was completed "Additional persons joined together in *a* new scheme" with new objectives. The Government claimed that the new parties adopted the earlier scheme, but of that there was no proof.

This admission of duplicity was, or should have been conclusive. And, respecting the question of intended meaning, presumably the draftsmen of the indictment then knew what they intended to allege and what the Grand Jury understood it to mean.

The Court below held (*infra*, 2712-2713) that repugnancy was not involved in this case because the "takeover scheme charged in the First Count was a localized short-lived offense" having its origination on July 1, 1955 and completed in September of 1955, whereas the "grand scheme" charged in Count 2 "was of much longer duration" (originating on March 18, 1955 and continuing to the date of the indictment) and encompassed a much broader scope of activity—including the acquisition of control of a public company. This reasoning escapes us completely.

In the Court below the indictment was also upheld by the cavalier statement that there really couldn't be such a thing as duplicity in mail fraud indictments. But we submit that the cases cited do not justify the conclusion.

In *United States* v. *Colson*, 145 F. 2d 82, the indictment charged a single scheme to sell oil interests by various frauds. The proof showed two groups, one in New York, the other in Boston. But the conviction was upheld because the two groups acted together on numerous occasions. The essential difference between that case and the case at bar is that the overall scheme was one to defraud

by the sale of stock and other interests and that the two groups acted continuously to that end. But here the Count 1 scheme to use the corporate funds for control had no relation to the scheme to defraud by sales which is the gist of Count 2, nor to the scheme to sell unregistered stock which underlies Count 50. Moreover, as already noted, the Count 1 scheme was completed before either of the other schemes could begin.

The *Weiss*, *McAlpine*, and *Owens* cases (122 F. 2d 675; 129 F. 2d 737, and 221 F. 2d 351) go no further than to hold that where a single scheme is charged various means may be set forth without duplicity. But there must be a connecting element in those means. And no such element appears to connect the use of Texas-Adams funds with the later fraudulent or illegal sales.

This Court has, in *Kotteakos* v. *United States*, 328 U. S. 750, made it clear that it is improper to combine unrelated schemes. Here there is need to pass on the applicability of that rule.

II

Another aspect of the sufficiency of the indictment is its reliance, in Count 50, on the charge that securities would be sold in violation of law without the filing of a registration statement (J. 88a). Involved in this is the application of the exemption under Section 4 (1) of the Securities Act of 1933 [15 U. S. C. §77d]. It exempts transactions "not involving any public offering". The term "public offering" is nowhere defined.

Petitioner contended in arrest of judgment (J. 1859a) that this language was so vague that no criminal prosecution could be based on acts claimed to violate the law.

The Court below (*infra*, 2726) rejected that claim on the ground that this Court had sufficiently defined the term in *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 119.

It should be pointed out, however, that this was a civil case and that the question of the applicability of that definition to criminal prosecutions has not been passed on by this Court.

If a penal act of Congress is so drawn as to make it really difficult to say what was intended and what facts come within it, the statute should not be extended by legal alchemy to supply what is omitted. *McBoyle* v. *United States*, 283 U. S. 25; *United States* v. *Resnick*, 299 U. S. 207; *United States* v. *Cardiff*, 344 U. S. 174; *Bell* v. *United States*, 349 U. S. 81.

III

Petitioner in the Court below claimed that his conviction under Count 2 should be reversed because the jury had acquitted him under Count 12.

As already noted, each of these counts was based on the same alleged fraudulent scheme and the mailing of the same Report to Stockholders (J. 49a-50a; 57a). The only difference was the name of the person to whom the Report was sent and the date of the mailing. But both were part of a single mailing operation conducted by the brokerage concern (J. 1214a, 1310a, 1515a). These two counts were coupled by the Trial Court in its charge (G. 235a).

The Court below (*infra*, 2726) rejected this contention on the basis of *Dunn* v. *United States*, 284 U. S. 390, saying that petitioner's contention "is completely without support in logic or precedent".

We submit that the *Dunn* case does not require the result here reached or, if it be so interpreted, that it should be overruled. Surely there is no lack of "logic" in the contention that an acquittal on one count vitiates a conviction on another when the issues submitted to the jury were, to all intents and purposes, identical. And ample precedent for that proposition existed prior to this Court's ruling in *Dunn*.

In *Murphy* v. *United States* (8th Cir.), 18 F. 2d 509, the authorities were reviewed. The Third and Eighth Circuits had ruled that a guilty verdict in such situation could be upheld only if it rested on evidence other than that on which the government relied in connection with the acquitted count: *John Hohenadel Brewing Co.* v. *United States*, 295 F. 489; *Peru* v. *United States*, 4 F. 2d 881-884. See also *United States* v. *Woodell*, 285 F. 2d 316, 317 (4th Cir.), stating that there had been "abundant authority" for that proposition. The Second and Sixth Circuits had held otherwise: *Steckler* v. *United States*, 7 F. 2d 59; *Gozner* v. *United States*, 9 F. 2d 603. And see *Macklin* v. *United States*, 79 F. 2d 756 (9th Cir.).

Since *Dunn* the problem continues to give the courts concern. In *United States* v. *Maybury*, 274 F. 2d 899, the Second Circuit refused to give a judge the same power of inconsistency which it had consistently allowed to juries. In other recent cases the Court of Appeals, while relying on *Dunn*, also went to some pains to point out that there was no actual inconsistency in the verdict. See *Blumenfeld* v. *United States*, 285 F. 2d 46, 55 (8th Cir.).

While the statement in *Dunn* that there need not be consistency has apparently been enthroned into a fixed rule, we do not believe that the holding in *Dunn* requires such a result. For there the evidence permitted a finding

of guilt with respect to the maintenance of a nuisance, even though the jury felt it did not permit a finding of guilt with respect to possession or sale of the liquor. But here there is no possibility that the jury could rationally have convicted under Count 2 when they acquitted under Count 12. Petitioner's connection with the mailings was the same they could be attributed to him only by reason of other matters. Moreover, the jury convicted certain of the defendants under Count 12 (J. 25a), thus finding that the mailing there referred to had taken place.

We submit that the case at bar calls for a reconsideration of *Dunn*.

IV

It developed on numerous occasions during the trial that the prosecutor had interviewed prospective witnesses, made notes of some of the things said, transferred the notes, with other matter, to the so-called "witness sheets" and then destroyed the notes (see J. 405a-447a). In other instances the notes themselves were preserved (see J. 535a). As Mr. Lankenau, a government prosecutor, testified, most of the notes consisted of what the interviewed person had said (J. 423a). The Trial Court refused all requests for production either of the notes or the witness sheets on the ground that they were not of the character of statement described in the "Jencks" Act (18 U. S. C. 3500) (J. 374a-5a). The Court below affirmed (*infra*, 2724) on the authority of *Palermo* v. *United States*, 360 U. S. 343.

We do not believe that this Court, in *Palermo*, intended to sanction a practice which would defeat the salutary rule it laid down in the case that brought about the enactment of the law, *Jencks* v. *United States*, 353 U. S. 657. The

underlying purpose of the rule there laid down by this Court was to enable the defense in a criminal prosecution to ascertain whether testimony given by a witness at the trial was inconsistent with what he had previously told agents of the government. It so happened that in *Jencks* the witnesses involved were informers who had submitted both written and oral reports. This Court ruled that the defense was entitled to see the written reports and the records made of the oral reports. The basis for the decision was that "Justice requires no less" (p. 669).

In *Palermo* the defense was given the transcript of the witness' questioning by the Internal Revenue Service and a supplementary affidavit made by him. It was, however, denied access to a summary prepared by an agent of a conference at which the affidavit had been executed. This Court, considering only the statute, held that the memorandum in question had been properly refused. Mr. Justice Frankfurter noted (360 U. S. at 352) that the statute was designed to cover more than automotic reproductions of oral statements, but held that only those statements need be produced which could be called the witness' own words.

But, as pointed out in Mr. Justice Brennan's concurring opinion (id. at 361, 362), many situations can be envisioned in which a memorandum of a conference might not be in the words of the persons interviewed, might be selective, and might contain other matter, yet which dealt so specifically with a vital point in the case that the statement should be available to the defense. And he pointed out that grave constitutional issues might arise under the Sixth Amendment should a statute be interpreted so narrowly as to interfere with a proper defense.

In the case at bar, we submit, this situation has arisen. Here the defense was, with some exceptions (see J. 406a)

unable to obtain any statements made by witnesses. Yet the witnesses had been interviewed. The defense had no opportunity to show that in these pre-trial interviews statements were made inconsistent with the testimony. Moreover, the destruction of the original material has deprived even the Court of an opportunity to ascertain the extent to which it might have come within the statute. If the practice here pursued be approved, then the defense would be left completely in the dark and the door opened wide for changes of stories by witnesses without any risk of detection. Surely that is not a compliance with the requirements of justice stressed in *Jencks*.

These observations derive even greater force here in view of the completely unjustified practice so often followed by the prosecutor of destroying the original notes.

The problem can be sharply focussed in relation to a particular aspect of the trial. Carroll, as already noted, testified to two meetings in July 1955 at which petitioner had been present and at which Texas-Adams had been mentioned as one of several companies controlled by McCarthy (J. 520a, 524a). This testimony was incorrect since Texas-Adams had not yet been known to the McCarthy group (see J. 1337a, 1352a). And in the Court below—but not before the jury—the government admitted that Carroll had been "unquestionably wrong." Now Carroll had been interviewed by one of the prosecutors who took notes that were marked Court's Ex. 7-B for identification (J. 535a). But their production was refused (J. 536a).

Now suppose that in those notes a statement appeared, in whatever form, that there had been no reference to Texas-Adams on those occasions. Should not the defense have had an opportunity to have that brought to the jury's attention either by questioning Carroll or by

putting the interviewer on the stand? And it should make no difference that the notes might contain other material which constituted lawyers' work product. Such material could easily be covered over by the Trial Court.

We submit that a serious question arises for consideration by this Court, both under the statute and under the Sixth Amendment.

V

Petitioner, as already noted, produced character evidence which the Court below called "an impressive array" (*infra*, 2698). The Trial Court had referred to this in the early portion of its charge as follows:

> "There has been testimony as to the previous good character of the defendant Mittelman. You should consider such evidence of good character, together with all the other facts and all the other evidence in determining his guilt or innocence. Evidence of good character may, in itself, create a reasonable doubt where, without such evidence, no reasonable doubt would exist.
>
> "But if from all the evidence you are satisfied beyond a reasonable doubt that Mittelman is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit him merely because you believe that he has been a person of good repute.
>
> "It may be that those with whom he had come in contact previously have been misled, or that he did not reveal to them his real character or acts.
>
> "The testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion of Mittelman's character, nor is it to

be taken by you as the witness' opinion as to his guilt or innocence.

"The guilt or innocence of Mittelman is for you, and you alone, to determine" (G. 160a, 161a).

The Court below upheld this charge as a correct instruction "on the role of character evidence as going to prove community attitudes rather than personal belief" (*infra*, 2717).

We submit that the actual charge was not as paraphased by the Court below.

It may be true that it has become the rule, much criticized by Wigmore (4th Ed., Secs. 1981, 1982, 1986) that the personal opinion of the witness as to the reputation of the accused may not be directly sought. But it does not follow that the jury is foreclosed from assuming, as it most surely normally does, that the witness is of necessity merging his personal opinion into the community view.

In the Court below the government relied on *Michelson v. United States*, 335 U. S. 469, as sustaining the Trial Court's charge. It should be recalled, however, that in that case this Court was not considering the propriety of any charge, but of a question on the cross-examination of a character witness about an earlier arrest of the defendant. And the statement by Mr. Justice Jackson (at p. 477) relied on by the government does no more than to exclude proof of specific "good" acts (cf. Mr. Justice Rutledge at p. 491).

It may also be true as was said in the *Michelson* case, that a defendant takes a calculated risk when he introduces character evidence. The risk is that the prosecution may have evidence damaging to the alleged reputation for good character. But in the absence of such evidence, does he take the risk that the trial judge may attack

his reputation by subtle suggestion that the accused has over the years deceived the good friends he has brought before the jury. The influence of the trial judge in a lengthy trial is not to be gainsaid. Here the charge completely nullified the testimony of the witnesses. It was tantamount to denying it any weight. It was prejudicial error.

The charge here used by the Trial Court appears, according to the government's brief below, to have become standard in the Southern District of New York. It appears to be inconsistent with the views expressed by this Court in *Edgerton* v. *United States*, 164 U. S. 361, 366. It is important, therefore, that its propriety should be passed on by this Court.

VI

The Court below reversed the conviction of the three broker defendants, and dismissed the indictment as to them. On application for rehearing the Court's attention was directed to the prejudice which resulted because evidence was received which would have been inadmissible had these three persons not been defendants. The Court below ignored the matter in its denial of the petition.

Since none of this prejudicial testimony would have been admissible at a trial at which the broker defendants were not included as conspirators, it would be a miscarriage of justice to permit the conviction of the other defendants to stand. No one can say to what extent the jury may have been influenced by that testimony. And a conviction so based should be set aside: *Kotteakos* v. *United States*, 328 U. S. 750.

We submit the situation is similar to that in which a jury has been permitted to find a verdict on a theory of

the case which should not have been submitted to it. In such situation reversal necessarily follows: *Stromberg* v. *California*, 283 U. S. 359, 367-368; *William* v. *North Carolina*, 317 U. S. 287, 291 292; *Cramer* v. *United States*, 325 U. S. 136, n. 45; *Yates* v. *United States*, 354 U. S. 298, 312.

So in *Anderson* v. *United States*, 318 U. S. 350, the conviction of all defendants was reversed because confessions by some of them had been improperly received. And in *McDonald* v. *United States*, 335 U. S. 451, the same result was reached where evidence had been illegally seized from one of the defendants. (Cf. *Darby* v. *United States*, 293 F. 2d 33, 9th Cir.) As was said by Judge (now Chief Judge) Lumbard in *United States* v. *Tomaiolo*, 249 F. 2d 683 (2d Cir.), at p. 696:

> "Where errors as to one defendant are so substantial and; of such nature as to affect a co-defendant with whom he is tried jointly, appellate courts have reversed the convictions of both defendants on trial where it seemed that they could not have been fairly tried. United States v. Thomson, 7 Cir., 1940, 113 F. 2d 643, 129 A. L. R 1291; Feder v. United States, 2 Cir., 1919, 257 F. 694, 5 A. L. R. 370; Smith v. United States, 5 Cir., 1956, 230 F. 2d 935; Nelson v. United States, 1953, 93 U. S. App. D. C. 14, 208 F. 2d 505; Duncan v. United States, 7 Cir., 1928, 23 F. 2d 3."

The recent case of *Schaffer* v. *United States* appears to point the clear way to the answer to this unusual question. (*United States* v. *Schaffer*, 266 F. 2d 435; *Schaffer* v. *United States*, 362 U. S. 511). In that case three separate groups of defendants were charged in three separate counts with "knowingly transporting stolen merchandise". The fourth count charged a conspiracy to transport stolen merchandise in interstate commerce. Defendants did not

take the stand, and at the conclusion of the case, defendants moved for the dismissal of the conspiracy count which was granted.

The Court of Appeals agreed that absent the conspiracy count, it would have been error to try the appellants together. But the Court of Appeals held that no prejudice had resulted as contended by appellants.

The Court of Appeals said (266 F. 2d at 441):

> "* * * We have no problem of evidence admitted against one appellant which incidentally implicates another. There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant in turn. Each defendant lived in a different part of the East, except the two Schaffers who operated their store together; and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.
>
> "At best appellants' claims of prejudice come down to a complaint about the guilty 'atmosphere' built up by associating each with others so obviously guilty, and the fact that a 'tainted' witness was buttressed by the independent proof relating to all defendants, instead of that relating to one alone."

This Court granted *certiorari*, and then affirmed by a vote of five to four.

Judge Douglas in a separate dissenting opinion said:

> "The Court of Appeals, while conceding that it would have been clearly erroneous to try petitioners together were it not for the conspiracy count, con-

cluded that no showing of prejudice had been established and that the District Court did not abuse its discretion in denying separate trials.

* * * * *

I take a different view. I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other."

* * * * *

The principals enunciated in the *Schaffer* cases both in the Court of Apeals, and in the majority and dissenting opinions in this Court dictate the necessity of a reversal in this case.

In the *Schaffer* case the Trial Court dismissed the conspiracy count with the consequence that the jury was properly advised as to the situation resulting from the dismissal. In the instant case the dismissal as to the broker defendants came in the Court of Appeals, long after the jury's verdict. Who can tell what the effect would have been upon the jury had the Trial Judge dismissed Count 50 as to the broker defendants, and had ordered stricken from the record all the prejudicial testimony adverted to above?

In the *Schaffer* case the damaging testimony came from a single witness whose testimony was directed to all of the defendants. In the instant case the evidence came from many witnesses and sources who and which had no relation whatever to petitioner.

In the *Schaffer* case the central issue was simple. In the instant case the Court below conceded that the case was complex.

In the *Schaffer* case the trial lasted two weeks. In the instant case it lasted several months.

We submit that the reversal of the verdict against the broker defendants for lack of proof requires a new trial for petitioner because much of the proof which related solely to them could not have come in but for their improper inclusion as defendants in the case.

VII

We realize that in this ground we are asking the Court to depart from its general and well justified reluctance to review a conviction after it has been passed on by two courts. But we do so because we feel strongly that a miscarriage of justice has resulted, one which, if not corrected, will destroy the career of a lawyer who has had an unblemished reputation.

We believe that the combination of circumstances already outlined resulted in a trial that was so unfair to this petitioner that this Court should review it. We shall briefly recapitulate these circumstances:

(a) The $19,000

The prosecutor in his opening charged petitioner with having failed to return $19,000 of Homestead funds (J. 143a-145a) and permitted a witness, Holland, to testify on the subject (see J. 347a), although the facts were otherwise (see J. 568a, 569a, 1753a-1757a, 1759a). The Court below recognized that this "was quite prejudicial and might have been excluded" but it justified its receipt as being relevant to other aspects of the case (in what particular was not indicated). This started the case against petitioner in a most prejudicial light.

(b) The Trial Court's Attitude

We have summarized numerous instances throughout the trial of harassment of petitioner's counsel which necessarily affected his conduct of the trial and must have produced a very unfavorable impression on the jury.

(c) The Carroll Testimony

As already pointed out the prosecutor let a witness (Carroll) testify to statements made by petitioner indicating his connection with Texas-Adams in July 1955 (J. 518a, 521a, 522a-524a), although the prosecutor knew, from other wholly credible witnesses (see J. 336a, 337a, 348a, 1337a, 1352a) that this could not have been so. And, in the Court below, the prosecutor conceded that Carroll's testimony was "unquestionably wrong." Yet he did not disavow it before the jury. That was another nail in the coffin which the jury was thus permitted to use.

(d) The Government's Cross-Examination of Its Own Witness

When the witness Greenberg was on the stand the Court, over objection by defense counsel (J. 785a, 789a), permitted the government to cross-examine him on the theory that the government was surprised (J. 785a, 789a) and that the witness had proved hostile (J. 803a). The question arose because the witness had testified that he had received certain Texas-Adams stock registered in the name of Jannis from one Dawson and didn't know its source (J. 793a), while the government had expected him to testify that it had come from one of the broker defendants, Gordon. The basis for the government's expectation was a post office inspector's interview with the witness (J. 784a). It appeared later that the witness had twice conferred with government counsel and told them that he repudiated what the notes of the interview dis-

closed (J. 796a-799a). Defense counsel then moved to strike his testimony and for the withdrawal of a juror because of the prejudicial character of the testimony (J. 800a-804a).

The Court below did not discuss this episode, probably because it reversed the convictions of the broker defendants. But it surely must have a profound prejudicial effect on the jury.

(e) Receipt of Evidence

We have already noted that the way in which the indictment was worded permitted the introduction against this petitioner of the evidence with regard to the misuse of the funds of Texas-Adams for the purpose of obtaining control of it, although petitioner was not connected with that transaction in any way.

(f) In addition, the prosecution was allowed to bring in a whole series of transactions which bore so remotely on the basic charges of the indictment that the purpose of doing so was primarily to depict all the defendants as bad men and so prejudice the jury.

Of this character were the following:

1. The *Worth Investment Deal*: The transaction was entirely outside the scope of the alleged conspiracy, and by its very nature precluded participation or adoption by the other alleged conspirators (J. 1102a; 1107a; 1108a; 1111a; 1114a).

The over-all effect was to show that certain of the defendants looted the corporate till for personal gain. The over-all conspiracy-charge made it possible to designate loosely "all" the defendants as associates in the alleged crime even though it bore no relation to the conspiracy charged in the indictment.

The Trial Court charged (G. 220a, 221a) that the jury could infer from the evidence that one or more of the defendants had "violated his trust and committed fraud."

2. The *Lazy Jay Deal*: In this transaction McCarthy sold to a co-conspirator, Larry Rosen, a parcel of property owned by Texas-Adams, known as "Lazy Jay". Rosen bought the property by secret arrangement with McCarthy pursuant to a pre-arranged sale in Canada for a substantially higher price. He divided the swag with McCarthy (J. 1350a *et seq.*). Here, again, is a transaction having no relevancy to the alleged conspiracy. It was a strictly private, secret off-the-record deal in which none of the other alleged co-conspirators was involved, and was clearly not in furtherance of the alleged conspiracy (J. 1348a *et seq.*).

3. The *Crosby-Jannis Deals*: These deals were spelled out in a written communication between Crosby and Jannis in which they admitted between themselves that Jannis was acting as agent for McCarthy, Pettit and Meredith in connection with the sale of Texas-Adams stock, allegedly obtained by fraudulent means from Texas-Adams. The proceeds of the sales were allegedly divided among them (R. 2398, 2421, 2440, 2488, 2490 and Ex. 60A). Petitioner was not one of the participants although the Court below incorrectly included him in its opinion which it subsequently corrected after the application for rehearing.

The prejudice to petitioner was grave because, though the letter did not suggest that he was a member of this inner group, and had shared in the spoils, the judge in his charge to the jury obfuscated the contents of this baneful letter. He referred to the letter as one involving Crosby, McCarthy, "and others" (G. 211a).

This was at the end of a long trial. The letter was short. The judge could have read the letter or specified the names mentioned. He said instead "McCarthy and others". It is not difficult to assume that the jury could have included petitioner as one of the recipients of the Crosby largesse by reason of the fact that it was his opinion letters which released the stock which was issued to Jannis and sold by Crosby.

(4) The record is replete with private sales by McCarthy and Crosby of Texas-Adams stock for personal profit. These derelictions weighed heavily on the other defendants who were completely unconnected with them. Taken "subject to connection" which was never established, the other defendants had to bear the burden of transference of guilt by alleged conspiratorial association.

Kotteakos is authority for the proposition that an alleged single overall conspiracy encumbered by extraneous prejudicial issues, and numerous defendants with complicated issues at law, may become too difficult for consideration by a jury.

Kotteakos is a striking case historically. But it is merely a special instance of a well grounded rule that prejudicial collateral matter may not be introduced into a case, though possibly relevant, if the overall result is to prejudice a defendant's rights. Because of the extreme latitude improperly and unfairly extended to the government, petitioner's rights were prejudiced!

The trial judge seems to have taken it for granted that anything done by a conspirator regardless of its relation to the conspiracy was chargeable against the alleged co-conspirators. This is, of course, not the law.

It was Judge Hand who said in *United States* v. *Peoni*, 100 F. 2d 401, 403 (C. C. A. 2d, 1938):

> "At times it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later-comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. The confusion is perhaps due to the fact that everything done by the conspirators—including the declarations of later entrants—is competent evidence against all, so far as it may fairly be thought to be in execution of the concert to which the accused is privy, though that doctrine too is often abused.'

(g) The Post Verdict Motion

This motion was based on the jurors having learned of McCarthy's plea of guilty in disregard of the Court's instructions not to read about the case or to listen to radio comments (J. 1876a-1897a).

It should be noted again that petitioner's counsel had pointed out the likelihood that, without intention, the jury might learn of the McCarthy plea and asked the Court to inquire the next day whether they had learned of it (J. 227a, 228a) Because other counsel objected the Court refused to do this (J. 228a, 229a).

The Court below upheld the denial of that motion primarily on the ground that the plea could have been taken in the jury's presence (*infra*, 2719). In support of that view the Court below cited *Wood* v. *United States*, 279 F.

2d 359 (9th Cir.); *Richards* v. *United States*, 193 F. 2d 554 (10th Cir.), and *Schiefer* v. *United States*, 288 Fed. 368 (3d Cir.). And it ruled that the effect on the jury could not be inquired into, citing *McDonald* v. *Pless*, 238 U. S. 264, and *Rotundo* v. *Isthmian S.S. Co.*, 243 F. 2d 581 (2d Cir.) and 8 Wigmore on Evidence (2349. The *Pless* case, however, carefully pointed out that no inflexible rule should be laid down.

The cases that support taking a plea of guilty in the presence of the jury do so on the theory that explicit instructions remove any possible prejudice. Normally these take the form of a statement that the plea should in no way be considered as bearing on the guilt of any other defendant, or even as to the commission of the offense charged. In the case at bar no such instruction could be given since the jury was not supposed to know about the plea. Of course the jury knew that something had happened since McCarthy disappeared from the scene. So the trial Court told the jury only the following: "The defendant McCarthy is no longer on trial, and you, therefore, have no verdict to render with respect to him" (G. 161a). And, toward the end of the charge, he told the jurors to disregard anything they had read or heard about the case outside the evidence and that the guilt of each defendant must be considered separately (G. 330a).

Can these generalities be equated with the specific caution given in the cases cited by the Court below? We believe not. At least the issue is an important one meriting consideration by this Court.

Taken together, we submit, these matters prevented petitioner from having had a fair trial.

CONCLUSION

It is respectfully submitted that this Court should issue the writ prayed for.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

See Opposite

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 302—October Term, 1960.

(Argued May 9, 1961 —Decided August 22, 1961.)

Docket No. 26398

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCIS PETER CROSBY, J. LEONARD GOLDBERG, PHILIP GORDON, EUGENE MEREDITH, LEO B. MITTELMAN, WORTH PETTIT, JR., PAUL REICHER and PHILIP GORDON & COMPANY, INC.,

Defendants-Appellants.

Before:

FRIENDLY and SMITH, *Circuit Judges*, and WATKINS, *District Judge**

Appeals by seven individual defendants and one corporate defendant from judgments of conviction entered on various counts of a fifty count indictment after a trial in the District Court for the Southern District of New York before Hon. Lloyd F. MacMahon, *J.* and a jury. 15 U. S. C. §77e(a)(1) and (2), 18 U. S. C. §§371, 1341, 1343. Affirmed

* U. S. District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

as to four individual defendants on all counts; reversed and remanded with instructions to dismiss the indictment as to three individuals and the corporate appellant.

ARNOLD N. ENKER and GEORGE I. GORDON, Asst. U. S. Attorneys, S. D. N. Y., New York City (Robert M. Morgenthau, U. S. Attorney and Peter H. Morrison, Asst. U. S. Attorney, S. D. N. Y., New York City, on the brief), *for appellee.*

RICHARD OWEN, New York City, *for appellant Francis Peter Crosby.*

MENAHEM STIM, New York City (Allen S. Stim, John F. Kelly, M. Walter Hulkower, New York City, on the brief), *for appellant J. Leonard Goldberg.*

MAURICE NESSEN, New York City (Rubino, Franken, Kramer, Bam & Nessen, New York City, on the brief), *for appellant Philip Gordon.*

CHARLES GREENBAUM, New York City, *for appellant Eugene Meredith.*

EDWARD M. GARLOCK, New York City, *for appellant Leo B. Mittelman.*

EDWARD E. RIGNEY, New York City (Alexander & Green, New York City, on the brief), *for appellant Worth Pettit, Jr.*

MOSES L. KOVE, New York City (Menahem Stim, New York City, on the brief), *for appellant Paul Reicher.*

SMITH, *Circuit Judge*:

These are appeals pressed by a stock brokerage firm and seven individual defendants found guilty on various fraud and conspiracy charges of a fifty count indictment after a protracted jury trial of some fifteen weeks. Some appellants urge insufficiency of the evidence as grounds for reversal while others claim the case against them was rather weak and inconclusive—thereby magnifying the prejudicial effect of claimed misconduct and excessive zeal on the part of the prosecution and of alleged errors on the part of the Court. There is little choice, therefore, but to delineate in some detail the scheme or schemes charged to the appellants as developed in a trial transcript of approximately 9000 pages.

The only convicted defendant not appealing, Texas-Adams Oil Co., Inc. (Texas-Adams), was the central "glue" in the fraudulent schemes charged by the government. Count 1 was a so-called "wire fraud" count, 18 U. S. C. §1343; in it defendants Crosby, McCarthy[1] and Pettit were accused of using interstate telephone wires in furtherance of a plan which resulted in the defendants "purchasing" control of Texas-Adams using that company's own funds as consideration, thereby defrauding the other stockholders. Counts 2-32 charged Crosby,[2] Meredith, Mittelman, Pettit and Texas-Adams with violations of 18 U. S. C. §1341, the Federal "mail fraud" section. While each count was based on a separate alleged mailing, the "scheme or artifice" charged was the same in all cases. The government gen-

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1 William J. McCarthy, president of Texas-Adams during most of the period pertinent to the indictment, changed his plea to guilty during the first week of the trial. Appellants moved for mistrial on the basis of that change of plea and assign the Court's denial as error; this contention will be discussed *infra*.

2 Crosby was named, in this group, only in Counts 2-7, 12 and 14.

erally sought to prove that the defendants had made or knowingly sanctioned fraudulent misrepresentations to the investing public and to brokers and businessmen dealing with Texas-Adams; that defendants had engineered various corporate mergers and purchases, with little or no business substance, whose sole or principal purpose was the flooding of the market with worthless or overpriced Texas-Adams share certificates; and that defendants had fraudulently authorized the issuance of corporate stock without consideration in return for "kickbacks" from the proceeds of the sales of those shares. Further, the Count One "scheme" was incorporated by reference into these mail fraud counts.

The next seventeen counts charge all the aforementioned defendants, save Crosby, plus Goldberg, Gordon, Reicher and Philip Gordon & Co., Inc. with wilfully and knowingly using the mails to sell common stock of Texas-Adams—which stock was not covered by a registration certificate filed with the Securities and Exchange Commission, 15 U. S. C. §§77e(a)(1) and (2), 77x. Many of the mailings concerned a multi-colored brochure, allegedly containing many fraudulent misrepresentations, entitled "Texas-Adams—an industrial empire is under way."[3] The final count was the ever present conspiracy indictment. In it were accused McCarthy and all the appellants in addition to Joseph Castagna and Guy Gully, acquitted by the jury. Numerous co-conspirators, not defendants, were also named —many of whom testified at the trial. The thrust of the alleged conspiracy was the use of the mails to foster the

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3 In Counts 39-49 the mailings involved were of share certificates of Texas-Adams. Philip Gordon & Co., Inc., and the three individual broker defendants, Gordon, Goldberg and Reicher were not charged in Counts 39 and 40.

sale of unregistered securities; all of the appellants were convicted on this count.[4]

I. *The Texas-Adams Story*

A. *Pre-Natal Activity*

Relevant proof adduced by the government at trial actually went back in time several months before the principal "management" defendants obtained control of Texas-Adams. During the summer of 1955 McCarthy and Mittelman were engaged in negotiations with one Claget Sanders to purchase from the Ajax Oil Company concededly valuable oil producing properties in what were known as the Bonanza and Poplar fields in Montana and Wyoming. The price agreed upon was $1,250,000.

It was at about this time, in June, 1955, that the American Montana Oil & Gas Corporation, later used as a dummy buyer in the fraudulent takeover of Texas-Adams, was organized by Mittelman, a New York attorney; however, no organizational meeting was held until October, at which time Crosby, Pettit and McCarthy were elected its officers.

An early linking of appellant Crosby to McCarthy and Mittelman was shown by Basil Zavoico. He was a petroleum

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4 The trial court dismissed thirteen of the counts before the case was given to the jury, four of the mail fraud counts (3, 8, 28 and 29) and nine of the counts dealing with the use of the mails to sell unregistered securities (33, 35-7, 41, 42, 44, 45, 49). Crosby was found guilty on Counts 1-7 and 50, but acquitted on 12 and 14; Meredith was convicted on all counts submitted to the jury except Count 1 (he was not named); the jury convicted Pettit on the surviving counts between 1 and 22, 39, 40, 43 and 50—and acquitted him on 23-32, 34, 38, 46-8; Mittelman was found guilty only on the first mail fraud count and on the conspiracy. The brokers were convicted on all counts on which their names were submitted to the jury, 34, 38, 46-8 and 50. The government, on appeal, has confessed error on Counts 34 and 38; the proof there showed that the brochures allegedly mailed to facilitate sales of unregistered securities were not mailed until *after* the sales proved in those counts.

consultant approached by Crosby in May of 1955 to obtain engineering reports on the Bonanza and Poplar properties. A month later Crosby again retained him to prepare a statement reflecting the financial structure of a Dumont Airplane & Marine Instrument Co. after an anticipated purchase by that corporation of the Ajax properties. (Zavoico was told that American Montana held an option to purchase from Ajax—and would in turn sell to Dumont.) The terms of the projected Dumont-American Montana "sale" would have netted a $2 million profit for the latter company.[5]

Apparently lacking funds to swing the Ajax purchase, McCarthy and Mittelman then concluded an agreement, in Denver, with Homestead Oil & Uranium Co. of Colorado. They told Holland, president of Homestead, that they already had control of Dumont—and agreed, in return for a loan of $50,000 to be used as partial payment for the Ajax properties, to merge Homestead into Dumont.[6] The

5 Later, after the takeover of Texas-Adams, Crosby again contacted Zavoico and had him prepare a report on the projected sale of the Ajax properties—this time to Texas-Adams. The Sundown Oil Company was to pass on the Ajax fields (price to Sundown one and a quarter million) to Texas-Adams for $1 million in cash, $1 million in ten year notes, and 1,250,000 shares of Texas-Adams stock valued at that time at one dollar a share.

6 Homestead was apparently in trouble of its own. A public issue of $300,000 of its capital stock had been authorized without S.E.C. registration pursuant to a Regulation "A" exemption. The underwriters, however, had failed to obtain subscriptions for the entire issue; the promoters were faced with the possible necessity of undergoing the process of registration with its attendant public disclosures. Such a course may well have been a particularly uncomfortable one as Homestead had purchased certain "uranium properties" from one Paul R. Jones, a co-conspirator who appears to have specialized in acquiring worthless mining claims and reselling them to captive or cooperative corporations at a lucrative profit.

Probably to ease the difficult situation Homestead's promoters found themselves in, Mittelman and McCarthy undertook to complete sale of the subscription issue. 1,800,000 of the original public issue of

instrumentality set up for this merger was still another penniless, dummy corporation, Sundown Oil Co. of Colorado, which had as officers and directors McCarthy, Mittelman and Paul R. Jones, a co conspirator.

Although the record is silent on this point, plans for the acquisition of Dumont must have collapsed sometime that summer. Rather, an agreement was made between one Satiris Fassoulis and McCarthy whereby "groups" headed by those two men were to obtain control of Continental Car-na-var Corp.- at which time Continental would purchase all the stock of Sundown (which was to have acquired the Ajax properties). Holland and Homestead were in turn reassured by an agreement wherein Continental agreed to replace Dumont and merge with the uranium company.

The financial problems of McCarthy and Mittelman during this period are painfully obvious. The Ajax commitment called for 1¼ million dollars - the sole amount visibly raised was the $50,000 from Homestead in return for the promise of merger. The "McCarthy group" was to have produced $277,000 to purchase control of Continental in conjunction with Fassoulis; in order partially to meet their commitments in this direction, Mittelman was forced to go to Denver to obtain from Holland release of the same $50,000 which had been banked in Billings, Montana pend

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5,000,000 shares at $.05 remained unsold. Mittelman thereafter [illegible] shares with $90,000 borrowed from Howard P. Carroll, underwriting broker for Homestead, and an associate. He then borrowed the $90,000 back from Homestead, immediately repaid the personal loans, and headed back east with the stock, which he was to attempt to sell. Apparently, a half million shares were left with Jones in Birmingham, Alabama and Mittelman turned over the remaining certificates to Satiris G. Fassoulis in New York. Fassoulis had agreed to help dispose of the Homestead stock in order to help the McCarthy group straighten its financial skirts in connection with other proposed mergers and purchases being negotiated in New York, see *infra*. Homestead was finally merged into Texa-Adams after the "management" defendants gained control of that corporation.

ing closing of the Ajax deal. This money was then forwarded to the New York attorneys of the Limestreet Corporation, from whom McCarthy and Fassoulis were purchasing control of Continental. In the end, both the Ajax and Continental deals fell through for lack of funds—but both of these episodes shed light on the eventual Texas-Adams machinations.

B. *An "Industrial Empire" Is Begun*

While Crosby's connections with the foregoing transactions can only tangentially be inferred, he here enters the scene, center stage. In August of 1955 he, with co-conspirator Lawrence Rosen, placed an ad in the Wall Street Journal seeking the controlling interest in a publicly held corporation. Among those responding to the ad were the controlling shareholders of Texas-Adams Oil Co., Inc., defendants Gordon, Goldberg and Reicher. They had incorporated Texas-Adams two years before and had financed it with a public issue exempt from registration under Regulation "A." The company's headquarters were in the offices of the brokerage firm, Philip Gordon & Co., Inc. Texas-Adams had been relatively dormant during its short history—only in March of 1955 did it acquire an interest in some Texas oil producing properties which earned about $10,000 in gross income by the time of the sale of control to McCarthy and his associates in late September of that year.

Preliminary negotiations were held among Crosby, McCarthy and Goldberg and agreement was reached on the sale of 283,000 shares of Texas-Adams for $105,000—$45,000 at closing, $20,000 in sixty days and $40,000 in ninety days; the lion's share of the stock certificates was to be escrowed pending payment on the time notes.

Closing of the transaction was twice postponed because of the buyers' financing difficulties, the second postpone-

ment being accompanied by a $1,000 check, on September 25, 1955, to evidence the continuing good faith of the McCarthy group. Defendant Pettit had by that time joined the purchasing group as that check was traced from his account in a Salt Lake City bank.

The closing was finally consummated on September 27, 1955. The buyers' arrangements for "financing" were most interesting. Crosby and McCarthy approached Joseph Spiotta, a New Jersey money lender, seeking $40,300 to meet the closing installment of $45,000. He agreed to furnish that sum on the strength of a representation that Texas-Adams would use the City National Bank & Trust Co. of Hackensack, New Jersey (where Spiotta was a director) as a repository for funds, *and* on the strength of a guarantee that Spiotta's account in that bank would be credited with $42,000 *before* he ever parted with his money.

The Texas-Adams bank account, some $60,000, had been kept with the Underwriters Trust Company in New York. When the buyers represented that they were going to move that account to the New Jersey bank, the sellers agreed to switch the funds, prior to closing, to the Chemical Corn Exchange Bank, scene of the closing and one of two New York banks serving as correspondent to the City National in Hackensack.

On September 26th, the buyers opened three new accounts in Hackensack in the names of Sundown, American Montana and Texas-Adams; a token deposit of $100 was placed in each account. Proper corporate resolutions and signature cards for all the companies were filed with the bank and the corporate seal of Texas-Adams was exhibited and used for that purpose. At the same time a set of checks and deposit slips was prepared reflecting a series of transfers to take place the next day. $51,700 was to be

transferred from the Texas-Adams account at Chemical Corn to its City National account. Two Texas-Adams checks totaling $51,250 would then transfer funds to Sundown and American Montana; almost all of the amount deposited in Sundown's favor would be immediately credited to American Montana, the putative purchaser of Texas-Adams. Finally, an American Montana check for $42,000 was made out to Spiotta's account to "reimburse" that gentleman.

Next morning, the day of the closing (but before Texas Adams changed hands), Crosby attempted to make a wire transfer to New Jersey. A Chemical Corn official refused to make that transfer because the resolutions and signature cards gave authority only to the "old" management. Crosby quickly cured that defect by executing new resolutions and signature cards—once again using the Texas-Adams seal. The money was wired to the City National and Spiotta, after personally checking by telephone to make sure his account was $42,000 richer, "loaned" American Montana the funds necessary for the purchase.

Only $42,000 of Texas-Adams funds was actually used in the purchase of control of the corporation; $9,250 remained in the American Montana account in Hackensack. This money too was quickly siphoned off, however. Pettit, whose $4,700 with Spiotta's $40,300 had made up the purchase price, was handsomely rewarded in the form of two American Montana checks, a total of $6,700, drawn by Crosby and credited to Pettit's Salt Lake City account. The remaining $2,550 Crosby paid to himself through a dummy and co-conspirator, George Jannis, about whom we shall hear more later. Thus the "buyers" successfully contrived not only to purchase Texas-Adams with its own money, but also enriched themselves, from the till, for their labors.

C. *Dynastic Operations*

It is indeed difficult to telescope the fantastic activity of Texas-Adams and its controlling proprietors during the ten months or so after acquisition by McCarthy, Crosby and company in September of 1955. Texas-Adams' outstanding stock ballooned, during that period, from 750,000 to almost ten million shares; not one share, however, was at any time the subject of a registration statement filed with the S.E.C.

Many of the deals sought by Texas-Adams never reached fruition, usually for lack of necessary funds. Two of these were the so-called "Longview, Texas" acquisition and the Taylorcraft merger. An option to purchase the Longview properties (oil) for $275,000 was entered into in the name of one of the ever available corporate dummies, Sundown Oil Company of California. The search for this sum of money led McCarthy and Pettit to Alabama in November, 1955. There Paul Jones and Sterling Graham, a Pittsburgh broker and also a co-conspirator, were engaged in underwriting public issues of stock on two "intrastate" corporations, Warrior Products Company and Gypsy Mining Company, under the watchful eye of the Alabama Securities Commission. These corporations apparently were organized to buy some of Jones' seemingly boundless supply of "mining properties." Graham told McCarthy that the Alabama commission would not allow a Texas-Adams merger with either of the local corporations and suggested a merger between Texas-Adams and Taylorcraft, a Pennsylvania manufacturer of light aircraft into which Warrior was to have been merged.

Taylorcraft, which was experiencing ready cash difficulties of its own, was not the answer to Texas-Adams' need

for cash to close the Longview oil deal.[7] At this point, Jones came up with another, more suitable deal. He suggested that Texas-Adams buy from the Osage Mining Co. (another corporate repository for some of the Jones "properties") a lease on a feldspar mine in Spruce Pine, North Carolina for 375,000 freely transferable Texas-Adams shares. Jones would "accept" only the proceeds from the sale of 75,000 of those shares while Texas-Adams would receive, for its use in Texas, the proceeds from public subscription of the remaining block.

McCarthy not only accepted this offer, but, in implementing it, went a long step farther. The actual purchase of the mining lease was made in the name of American Montana—which company agreed to resell the feldspar mine to Texas-Adams for 650,000 shares plus a cash payment of $75,000. Much of the rest of the Osage story is too obscure and complicated to be drawn out in detail here. It is enough to say, however, that the sale, kickback and resale procedure was used as a vehicle to sell to the public hundreds of thousands of unregistered Texas-Adams shares; the same certificate for 375,000 shares was caused to be broken down and issued by two different stock transfer companies; the feldspar mine in question was inactive, flooded with water, and worthless; and, finally, Texas-Adams never bothered even to take title on the lease.

While the Osage transaction is perhaps the most artful example of the McCarthy stewardship of Texas-Adams,

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7 This, however, did not stop Texas-Adams from going ahead with negotiations for a Taylorcraft merger—perhaps in the hope of eventually grasping the Warrior funds which the aircraft company was to obtain. A Texas-Adams Taylorcraft merger was approved by the respective Boards of Directors and McCarthy and Crosby were elected to the five man Taylorcraft Board. The plan was never submitted to the stockholders of Taylorcraft for necessary ratification, however, and the final merger was never consummated. This fact, likewise, did not deter Texas-Adams from making untrue representations concerning the value of Taylorcraft in its market literature.

passing mention may be made of other corporate depredations. More than 70,000 shares of stock were issued, without consideration, to George Jannis, a chauffeur, valet and handyman of Crosby's, for imaginary loans and services rendered. These shares were cleared for trading by defendant Mittelman's opinion letters and the proceeds, after token payments to Jannis, went to enrich appellant Crosby at least.

Mergers were accomplished with the Empire Drilling Company and the United States Sulphur Company. In the former transaction a purchase of Empire stock was misrepresented as a purchase of all the assets of that company.[8] Further, machinery was set up whereby creditors and "interest holders" in wells being developed by Empire could trade their interests in Empire for Texas-Adams stock. All told, 3,100,000 shares of Texas-Adams were issued for these purposes. Aside from the fact that the U. S. Sulphur properties appear to have been worthless, the government proved no real infirmity in that transaction. On top of the quarter of a million shares actually used to buy out the United States Sulphur Company, however, an additional 150,000 shares were issued under fraudulent circumstances, purportedly in connection with the Sulphur Company deal, to L. W. Ltd., a Canadian dummy corporation which Mittelman "served" as vice-president.

The final notable transaction was the so-called Comigu deal, in which Texas-Adams bought, for two million shares, twenty prospecting permits on supposed tantalum mining properties on the bank of the Sinn Marie River in French Guiana. The seller was acquitted defendant Guy Gully and, like Osage, the transaction apparently involved a substantial kickback of shares which were then sold to the public

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8 The significance of this misrepresentation is discussed below.

through Castagna, McCarthy's young brother-in-law.[9] Once again, as in the case of Osage, Texas-Adams never bothered to take title to the permits.

Although the aforementioned dealings were highly effective in keeping a steady flow of Texas-Adams shares entering the market, it was a key to the success of these schemes to maintain the price of those shares at a fairly high level. This was accomplished by a high pressure public relations campaign coupled with the use of patently fraudulent misrepresentations in the company's public reports. Within a week of the September 27, 1955 takeover of Texas-Adams, Crosby and McCarthy contacted co-conspirators W. Ware Lynch and Russell Birdwell Associates, Inc. to start rolling a publicity campaign.

Lynch obtained newspaper coverage on the change in Texas-Adams control and management; the McCarthy name was fully exploited.[10] Later, there was extensive reporting of the Empire merger which stressed tremendous growth in the assets of Texas-Adams to a false figure of more than nine million dollars. In November of 1955, a "Report to the Stockholders" was sent to brokers dealing in Texas-Adams. Among major misrepresentations there made were statements that prior to the new management Texas-Adams had a yearly income of $35,000; that acquisition of the "Bonanza Field in Montana" had been accomplished, with resultant additions to income of $33,000-$34,000 per month; that the new management had acquired,

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9 As noted before, both Castagna and Gully were acquitted by the jury. Gully's defense, apparently accepted by the jury, was that his endorsement had been forged on the allegedly kicked back certificates. Whether the shares were kicked back by agreement or stolen and forged, the role played on the Texas-Adams side of the transaction was patently illegal.

10 McCarthy is the brother of Glenn McCarthy—of Texas oil and Shamrock Hotel fame.

for $300,000 and 850,000 shares of stock, some east Texas oil acreage with $24,000 net monthly income and $4 million proven reserves in each of five well locations; that negotiations had been completed to take over Osage, replete with "300,000 in cash and a producing feldspar mine • • • [and] valuable samples of uranium and mica"; and that Homestead, when merged, possessed cash totaling $140,000

Many of the foregoing—and other—misstatements of fact were made more specifically in a series of Texas-Adams *pro forma* balance sheets issued with the aid of Herman Lubin, an accountant and co-conspirator, in February and March of 1956. What the original report to the stockholders lacked from a purely artistic standpoint was amply supplied by the production and dissemination of an attractive, pictorialized brochure which substantially mimed the bald misstatements of fact and gross overstatements of assets contained in the earlier literature.

Such methods were generally successful, in conjunction with active promotion by various brokers in New York, Pittsburgh and Denver, in keeping Texas-Adams common priced at an artificially high level. The government adduced proof, however, that in at least one instance more direct market manipulation was necessary. Mass unloading of stock by the former creditors and interest holders of Empire was threatening, in February of 1956, to deflate seriously the market in Texas-Adams. In response to this danger, those shareholders were urged to sell back to the corporation at a guaranteed rate of one dollar per share. To support this corporate extravagance, brokers in turn were induced to buy the shares from Texas-Adams and pass them on to the public at that price. The brokers were encouraged to enter into these dealings by an offer of two bonus shares of Texas-Adams for every share bought at an artificial level; 200,000 shares emanating from the

Comigu-produced "gravy" were placed in escrow to provide this bonus stock.

II. *Sufficiency of the Evidence*

A. *The "Management" Defendants*

While Crosby, Pettit, Meredith and Mittelman do not dispute the fact that the evidence against them properly warranted submission of the case to the jury, they all argue that the record is equivocal as to their guilt--and that the factual issues involved are such close ones that even minor errors at trial would be deserving of a reversal by this court and a remand for a new trial. We disagree.

The proof against Crosby on the Count One scheme is overwhelming. His counsel would have us believe there was a genuine jury issue as to whether Crosby was in "good faith" in this transaction—i.e., whether the defendant considered the raiding of the Texas-Adams treasury a "loan" to American Montana. Ignoring the evidence that Crosby immediately caused to be drained the $9,000 not used in the purchase of control, and even if the record failed to indicate that American Montana not only was penniless but also had "no visible means of support," only an incredibly naive jury could be expected to credit such a story. His culpability on the mail fraud and conspiracy counts is similarly evident. The feeble contention that the Jannis assaults on the investing public were in legitimate pursuit of a deserved "finder's fee" is hardly worth mentioning.

Pettit and Meredith both challenge the degree of actual knowing and fraudulent participation proved by the government. Meredith, the only defendant who took the stand in his own behalf, attempted to define his role in the scheme as that of a mere errand boy. Both were experienced businessmen before they came east for their alliance with Mc-

Carthy; yet both would have us believe—and claim the jury might easily have found—they were credulous schoolboys completely taken in by the impressive, free-wheeling Texas oil "operator," McCarthy. Apart from the substantial incredibility inherent in these claims, there was more than ample independent evidence supporting scienter on the part of both defendants.

Pettit received back more than his original investment, from the Texas-Adams treasury, within two days of the takeover of control; a later payment, from proceeds of sale of Osage stock, was made to a Kathrine McDavitt, a lady friend of Pettit. A number of witnesses testified either that Pettit misrepresented facts[11] or was present and participating at conferences where McCarthy did the same. Meredith's activity on behalf of Texas-Adams was astounding; he was constantly back and forth all over the country picking up and delivering stock certificates, money and instructions. He signed innumerable checks and documents, and testimony indicated he was active in Denver in the trading of Texas-Adams stock for Empire interest certificates. While the heavy weight of the evidence would seem to indicate he was a "follower" rather than a "leader," this is a far cry from raising a doubt as to lack of criminal knowledge.

Mittelman, both at trial and here on appeal, has attempted the Herculean task of arguing away every single bit of damaging evidence produced by the government. We have carefully considered his extended discussions of the trial evidence but cannot agree there was any real doubt as to his guilt. Any conclusion of Mittelman's innocence

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11 Especially convincing, in this regard, was the testimony of the Longview, Texas, oilman, John C. Robbins, Jr., J. A. 816a, one of the few important witnesses who could not be impeached in any way by the hint of fraudulent involvement on his own part.

must rest upon the hypothesis that Holland and Carroll, the moving parties in Homestead Oil & Uranium, plus Kimmes, a Denver broker and co-conspirator, perjured themselves; that Harrison Miller, a New York broker, was mistaken as to dates when he testified that Mittelman vouched for Jannis in mid-November of 1955; that Purcell, an experienced securities attorney, was mistaken in his testimony concerning Mittelman and the Empire transaction; and that Mittelman was unbelievably hornswoggled by McCarthy due to an incredible naivete on the part of an experienced attorney.

It is true that some apparently damning evidence has been convincingly explained away. The overall involvement, however, is clearly shown. The Jannis, Empire and Comigu opinion letters, asserting the free transferability of those shares, are not adequately explained. Long after he concededly knew the truth about Jannis, Mittelman sold 5,000 shares of unregistered stock in Jannis' name for the account of his sister. Defendant's letter of April 30, 1956 to the stock transfer company stating that 150,000 shares of Texas-Adams being issued to L. W. Ltd., a dummy corporation of which Mittelman was vice-president, was for part payment of the purchase price of United States Sulphur Company is particularly damning. Despite appellant's meticulous analysis of the evidence, it is hard to see how the jury could have found Mittelman anything but guilty.[12]

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12 On this point, appellant Mittelman urges his acquittal on some 30 odd counts while he was convicted on only Counts Two and Fifty. While his inconsistency contention will be discussed *infra*, it will here suffice to point out that there were factors, other than directly relevant evidentiary ones, which may have led the jury to convict on only two counts. The collateral consequences to Mittelman, an attorney, may have weighed with the jury—plus the fact that at trial he produced an impressive array of character witnesses.

B. *The "Broker" Defendants*

Gordon, Goldberg and Reicher, the stockholders in Philip Gordon & Co., Inc., all contend the proof against them was insufficient to warrant submission to the jury. Guilty verdicts on the three substantive counts and the conspiracy count from which they appeal all involve use of the mail to effect wilful and knowing sale of unregistered securities. The proof is clear that no Texas-Adams stock was ever registered—*and that defendants knew that the particular* certificates involved in Counts 46-8 were not registered. There were, however, opinion letters claiming the shares to be exempt from registration. Two basic elements thus remain: Were the shares exempt? If not, does the record adequately prove the necessary knowledge on the part of these defendants to support the element of wilfulness? We hold that, while the shares should have been registered, there was insufficient proof from which the jury legitimately could have inferred wilfulness and criminal intent.

All the stock involved in the three substantive counts here involved stems from the two million shares issued to Gully in connection with the Comigu transaction. Philip Gordon & Co., Inc. received them for sale from Castagna. The Mittelman legal opinion letters concerning these shares asserted the stock was exempt from registration and free for trading; the opinion was based on S.E.C. Rule 133 which provides that for purposes of the criminal statute dealing with sale of unregistered securities no "sale" shall be deemed to have been made "so far as the stockholders of a corporation are concerned where * * * a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the transfer of assets of such corporation to another prison in consideration of the issuance of securities" is approved by a binding majority of

the stockholders. This exemption, which "has permitted the offering of literally billions of securities without registration" [13] probably fits the circumstances of the Comigu transaction; this court has specifically held, however, that the Rule 133 exemption applies only to the original exchange in which stock is transferred to the merged corporation's stockholders—and not to later resales if they otherwise are within the registration requirement. *S.E.C.* v. *Culpepper*, 270 F. 2d 241, 247-8 (2 Cir. 1959); see also *S.E.C.* v. *Mono-Kearsage Consol. Mining Co.*, 167 F. Supp. 248 (D. Utah 1958).

Similarly, none of the statutory exemptions are here applicable.[14] Philip Gordon & Co., Inc. and the individual defendants are clearly "dealers" within the purview of the

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13. Loss, Securities Regulations (1951), page 336.

14. "The provisions of section 77e of this title shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter and transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 77h of this title is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

"(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders." Section 4 of the Securities Act of 1933, as amended; 15 U. S. C. §77d.

Act;[15] their sales would have been exempt transactions, therefore, only if made more than forty days "after the first date upon which the security was bona fide offered to the public." The purchases of these shares by Gordon & Co. were from Castagna, nominee for controlling interests of Texas-Adams, the issuer. The Act defines Castagna himself as an "issuer" under those circumstances—which fact, in turn, made the broker defendants technically "underwriters."[16] Thus, by recourse to the definitional sections of the Act, we can circuitously, but inevitably, reach the otherwise immediately apparent truth—that the sales by Philip Gordon & Co., Inc. were the *first* public offerings of those shares, thereby rendering inapplicable the "forty day" exemption. Finally, since the defendants bought and sold the stock for their own accounts, the exemption accorded "brokers' transactions" is unavailable.

Since all of the government's evidence tending to tie the brokers into the overall conspiracy is relevant, in some degree, on the substantive counts for sale of unregistered securities,[17] the sufficiency of the evidence on both types of

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15 "The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly as agent, broker, or principal, in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another person." Securities Act of 1933, §2(12); 15 U. S. C. §77b(12).

16 "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer." Securities Act of 1933, §2(11); 15 U. S. C. §77b(11).

17 The sales in question, as noted, were of Gully-Comigu stock, a transaction which took place rather late in the short lifetime of Texas-Adams' greatest activity. Therefore, a showing that the brokers were

offenses may be treated together. Reicher was a 50% stockholder of the brokerage house, Gordon and Goldberg evenly dividing the remaining one half interest. Philip Gordon & Co., Inc. was not a big house and all three appellants were active in its management; Reicher and Goldberg supervised the sales force.

Chronologically, the government points first to the brokers' role in the sale of Texas-Adams to the McCarthy group. Although the proof failed to show directly that these defendants aided or knew of the arrangements by which they were paid out of the treasury of Texas-Adams, much is made of the fact that the buyers apparently used, two days running, the corporate seal in furtherance of their fraud. A Gordon & Co. employee testified that the seal was ordinarily kept in the office safe but he could not vouch for its presence at any one particular time. The attorney who handled the sale for the brokers could not remember whether he had given or loaned the seal to the buyers.

The second installment of $20,000 on the purchase price of Texas-Adams was raised through the sale of a large bloc of shares, for investment, to one Jack Baker. Part of this bloc, a certificate for 50,000 shares, was sold to Baker by Philip Gordon & Co. for the account of American Montana and the actual payment of the $20,000 was made directly from Baker to Goldberg.[18]

Other evidence relied upon by the government includes the fact that Goldberg sanctioned the cashing of one check payable to Jannis although such was not the usual prac-

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privy to or aware of a consistent course of fraudulent conduct on the part of the officers or attorneys of Texas-Adams would be relevant to the issue of their good faith in trading the unregistered securities.

18 The balance of the agreed upon purchase price for the investment shares was paid by Baker, in two smaller checks, to Meredith and Lawrence Rosen.

tice of the house; that Goldberg, in a hotel meeting with Kimmes and the chief officers of Texas-Adams, "suggested" a broker bonus arrangement to help stabilize the price of Texas-Adams shares near the one dollar mark; that Goldberg and Gordon questioned a salesman for a rival brokerage firm concerning the latter's source of "cheap shares" and that the salesman remarked that he smelled something "rotten"; and that the brokers, in pushing the sales of Texas-Adams stock, disseminated fraudulent literature put out by the alleged co-conspiratorial accountant and public relations firm. Finally, the government presses upon us the more than 500,000 shares sold to the public by Philip Gordon & Co., Inc. under various opinion letters- shares emanating from almost all of the various "transactions" of Texas-Adams—and insists that the extent to which the defendants did rely, or were entitled to rely, on the opinion of counsel was for the jury to determine.

The course of conduct of the three brokers in selling so many shares proves little[19]—it merely presents, in multiple instances, the same question posed by the three substantive counts here in issue: Were the brokers justified in selling unregistered stock on the representation of counsel that such shares or transactions were exempt from the registration requirement?

The evidence that the buyers used a Texas-Adams seat in implementation of the takeover fraud is far too weak a base from which to infer guilty knowledge on the part of these defendants. The gaps are too broad and substantial. To hold the defendants on this evidence, it must

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[19] Aside from the extensive dealing in Texas Adams stock by defendant Philip Gordon & Co., Inc., four other brokerage firms, the majority of which were named as co-conspirators, sold either more shares than Gordon & Co. or almost as many. In addition to these houses "pushing" or "dealing in" the stock, Texas Adams was generally traded by many other brokerage firms during the period of the McCarthy leadership.

be inferred that it was "the" seal, rather than a facsimile, that was used by Crosby; that the "defendants" (or one of them, with the blessing of the others) gave the seal over to the buyers; and that it was done with the intent to aid and abet the fraud. The government's evidence concerning the second installment payment through the sale of 50,000 shares of Texas-Adams held by American Montana is similarly weak and insubstantial. Appellee argues that the brokers "knew" Texas-Adams legitimately could not have declared such a large stock dividend to controlling American Montana only a few weeks after acquisition—and that American Montana would have paid the brokers directly if it had funds. The fallacies in this reasoning are clear. There are numerous transactions which might have been the base for legitimate issuance of this stock to the parent corporation; to state only the most obvious, American Montana might have transferred property, which they were loath to liquidate, to Texas-Adams as a means of obtaining stock, in turn to obtain funds, to pay the brokers.

Since the broker appellants were a principal outlet for over the counter sales of Texas-Adams stock, there is nothing strange about "hotel meetings" with the top officers of the corporation. The two meetings testified to prove little. The testimony concerning the first of those occasions shows only a concern on the part of the defendants that the market in Texas-Adams, in which they had considerable personal stake,[20] was being seriously undercut by "cheap stock" from unknown (to them) sources. The effect of Goldberg's suggestion of a bonus share arrangement at the latter meeting is compromised by the fact that Gordon & Co. bought or sold none of the Empire stock in

20 In most instances, apparently, these defendants were buying and selling on their own accounts—with attendant risk to themselves—rather than acting merely as brokers.

question and received none of the bonus shares.[21] Moreover, there was evidence that in this area of speculative mining, oil and uranium stocks in the over the counter market, the selling price of a security almost never has any relation to its intrinsic value and that substantial commission and bonus arrangements are the rule rather than the exception.[22]

Concerning the mailing of the fraudulent literature furnished by McCarthy et al., the record shows that it was standard procedure in the over the counter market for mailings to emanate from the brokers rather than the corporation. Jealous guarding of customer lists by the brokerage houses caused this practice. The claim that the defendants, as ex-controllers of Texas-Adams, should have known of the falsity of one assertion in the "Report to the Stockholders" is more serious. We believe, however, the single sentence in question was sufficiently ambiguous so that defendants were not required, at the peril of criminal liability, to challenge its accuracy.

As to the substantive counts alone, evidence is similarly lacking to refute appellants' apparent reliance on the representations of counsel. It is key here that the government nowhere showed that the brokers knew the details of the

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21 The government suggestion here is that this is explained by the fact that the price stabilization needed was a purely local problem in Denver. This overlooks the fact that by far the largest number of bonus shares went to a Pittsburgh brokerage firm.

22 Good examples of this practice may be found in the record of the instant case. Both Texas Adams and Homestead Oil & Uranium Co. were originally financed by a public issue, under a Regulation "A" exemption, to the tune of $300,000. Contemporaneous with the organization of the corporation and the public issue of the bloc of shares, the organizers and often the underwriters are issued investment shares greatly swelling the outstanding capital stock. When the large underwriting commissions on these speculative issues are then paid, the public's stock has by that time been effectively "watered" often by more than 50%.

alleged transfer from Gully to Castagna—or that they knew the latter's relation to and probable domination by McCarthy.[23] Thus there was no evidence that the brokers knew or should have known they were "underwriters" in terms of the Securities Act. Mittelman's original opinion letter to Philip Gordon & Co. concerning the Gully stock relied solely on Rule 133's special no-registration treatment for statutory mergers, etc.; his later letter to the brokers' counsel, however, stressed a combination of an original Rule 133 exemption and subsequent freedom to trade which allegedly arose because they were no longer "control stocks." While such a theory is probably invalid in light of this court's decision in the *Culpepper* case, *supra*, we cannot say that on its face the legal opinions tendered were so patently erroneous as to permit the jury to speculate on the good faith of the defendants.

It is always a difficult task in a complicated omnibus conspiracy case like this one to decide at what point the government has produced enough evidence against individual defendants to put their fates in the hands of the jury. Because of the tremendous potential for collateral prejudice inherent in these cases, however, the courts must be extremely scrupulous in sorting out the evidence against single defendants and weighing the same—divorced from the all too often damning influence of the background conspiracy. The case against these three defendants presents a peculiarly difficult problem in this regard because the prime issue is one of guilty knowledge and criminal intent. It is undisputed that the brokers' acts in fact furthered the conspiracy; the claim is persuasively made, however, that they were merely "doing business as usual" and, to

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23 In contrast to other brokers named as co-conspirators, there was a complete failure to connect these broker defendants with any of the fraudulent transactions by McCarthy and company underlying the eventual public offerings of stock

their best knowledge, according to acceptable standards of that business. The statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law. We think it is all too facile an answer for the government to rely on the experience and supposed expertise of these brokers; the fact is that they purported to rely on opinion letters of an attorney, whose expertise is presumed to be even greater. The scanty extrinsic evidence produced by the government against these defendants implies guilt only if we first assume guilty knowledge and purpose; when used to prove that basic element of the crime it is neither substantial nor convincing. The trial court erred in not directing a verdict of acquittal on all counts for defendants Gordon, Goldberg, Reicher, and Philip Gordon & Co., Inc.

III. *The Conduct of the Trial*

The four remaining appellants have advanced to this court a large number and wide variety of alleged errors which, they claim, warrant reversal of their convictions. Although almost all of the appellants complain of what they characterize as a prolix, rambling and disconnected presentation of the government's case, only Pettit and Mittelman strongly urge upon us the contention that they were unduly harmed by a combination of poor and confusing presentation by the government and prejudicial conduct on the part of the trial court.

As noted, the trial was a long one of three and one half months. Our own sketchy and incomplete statement of the facts gives some indication of the breadth and complexity of the schemes submitted to the jury for digestion. While the proof, as organized and offered by the government, may not have met some hypothetical concept of per-

fection, the presentation of the case was, on the whole, fairly orderly and logical. Difficulties presented by the very scope of the alleged frauds and by reason of the fact that the testimony of some witnesses was relevant to more than one aspect of the case were inevitably multiplied by problems, especially troublesome in a long trial with many cross-examining defendants, concerning the ready availability and procurement of witnesses.[24] Upon our reading of the record, we find that any direct or veiled charge of actual misconduct leveled against the government's attorneys is wholly without substance.

Complaints about the trial court's general handling of the case stem primarily from the same source of difficulty. Appellants tell us that "everything" was let in "subject to connection"; that in his charge Judge MacMahon made a few factual errors and generally favored the government in his summation of the relevant facts; and, finally, that the charge which took some eight hours to deliver was too long and confusing. Some specific claims of error will be discussed, *infra;* it here suffices to say merely that there is, practically, little a trial court can do in these cases except take large portions of evidence subject to connection. Moreover, there was presented in the instant case overwhelming independent evidence connecting each of the remaining appellants to the alleged frauds and to the conspiracy. The factual charge of the court was, in general, amply supported by the record; any small errors made are explained by the long and complicated nature of the case—and neutralized by the court's cautionary instruction to the jury.

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24 This problem was most acutely presented here because witnesses had to be subpoenaed from Denver, Pittsburgh, North Carolina, Texas and other farflung parts of the country.

The attack on the length of the charge is frivolous. Just as this type of trial, almost of necessity, must fall short of perfection in clearly and concisely presenting all the issues to the jury, the court's charge is inevitably similarly infirm. It may be true that the concentration span of a "real world" jury is, like that of any other twelve humans, a limited one. So long, however, as our appellate practice places so much weight on the hypothetical effect of a judge's charge, see dissenting opinion of Judge Frank in *United States* v. *Farina*, 184 F. 2d 18, 21 (2 Cir. 1950), extended instructions to the jury in many cases are a necessity.[25] That the instant case, with a transcript approaching ten thousand pages and nine individual defendants accused on various charges of a fifty count indictment, falls within the aforementioned category is only too evident.

Examination of the record shows that the charge of prejudicial conduct by the lower court is without foundation. Defendant Mittelman particularly complains of alleged unfair limitation of his cross-examination and summation. Administering a trial involving nine separate defendants and their attendant counsel is at best a trying task. Further, it here appears that the attorney for Mr. Mittelman had had consistent difficulty in marshalling his relevant facts and in conducting non-repetitious questioning of the witnesses. Under the circumstances, the trial judge was acting completely within his discretion and in furtherance of his duty to expedite the trial when he cut off Mittelman's attorney after he had gone more than a half hour over his self-requested five hour summation pe-

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25 It should be noted that Judge MacMahon handled the problem well under the circumstances. The jury was given a short break at regular intervals of approximately one hour. These recesses came at logical stopping points in the presentation.

riod. See *United States* v. *Campisi*, —— F. 2d —— (2 Cir. July, 1961).

IV. *Attacks on the Indictment*

Appellants' general complaint that the indictment was unforgivably prolix and a "pleading monstrosity" is closely akin to their objections to the trial presentation by the prosecution and the judge's lengthy charge. The government can hardly be faulted for prolixity when it appears that the very complexity and deviousness of the alleged swindles are the basic causes of confusion. Just as the ingenuity of the white collar criminal and quasi-criminal is mirrored in the complicated regulation of the securities industry,[26] the indictment in this case is a rather faithful picture of the activity charged to the defendants. Objection to use of the "incorporation by reference" device is merely a quibble; surely there is enough governmental waste without requiring complete reproduction, from count to count, of all allegedly relevant pleadings previously enumerated.

More specific assaults on the indictment are made. Mittelman argues that Counts One and Two are repugnant because the takeover scheme is incorporated by reference into the later count while Count One does not name him as a defendant; his alternative argument is that if there is no repugnancy then Count Two is of necessity duplicitous —and that his conviction on that count must fail on any account. Closely related to appellant Mittelman's attack on the first two counts is the argument made by all defendants that there was a fatal variance between the pleading and proof on the conspiracy count. Relying on *Kot-*

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26 Compare the field of federal taxation where the combination of a highly sophisticated tax bar and an obstinate if slightly less quick legislature have resulted in our present tax laws

teakos v. *United States*, 328 U. S. 750 (1946), they assert that the government proof tended to establish not one scheme, but a multiplicity of disjointed, unrelated criminal ventures—at most, a fatally amorphous "conspiracy to do evil." In support of this argument, they magnify the fact that some of the alleged parts of the "scheme" did not accrue directly to personal interests of all the defendants.

Appellants' reliance on *Kotteakos* is misplaced. The Supreme Court there decided only that a variance in the proof was prejudicial. That multiple conspiracies rather than one had been proven was conceded by the government. In that case one defendant had engaged in a number of quite isolated transactions, each with a different co-defendant, to obtain loans from government agencies on false representations. The Court of Appeals, *sub nom. United States* v. *Lekacos*, 151 F. 2d 170, 173 (2 Cir. 1945), aptly analogized the case to a fence who disposes of goods stolen by a number of independent persons; the fact that they know him to be a fence does not mean all conspire together.

The proof in the instant case reveals a far more integrated scheme. The government argues correctly that the evidence establishes, basically, a central plan to effect the issuance and sale of worthless or grossly overpriced unregistered corporate securities to an uninformed and deluded investing public. The implementation of corporate "deals" and mergers as a cover for the fraud was an almost constant factor; the use of both kickbacks and resales by compliant dummy corporations—plus the issuance of stock for falsely declared consideration—reflects a relatively consistent, if varied, pattern of operation. Recurrent personal misrepresentations dovetailed neatly with the fraudulent publicity campaign to create a false public image of Texas-Adams. Mittelman's opinion letters consistently supplied still another necessary element in the success of

the fraud. The non-broker defendants indisputably worked together in the Texas-Adams venture; indeed, the only possible questions raised at trial concerned the extent to which certain of these defendants either were duped by or blindly followed the others.

A mail fraud scheme consisting of a large number of similar transactions, conducted by a constant nucleus with differing subordinates, was held basically a single conspiracy in *United States* v. *Cohen*, 145 F. 2d 82, 87-8 (2 Cir. 1945). We have also declared with reference to determining whether the proof is of one or two conspiracies that when a conspirator "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." *United States* v. *Andolschek*, 142 F. 2d 503, 507 (2 Cir. 1944). It is certainly no problem that not all the details were formulated at the outset; "A single scheme to defraud may involve a multiplicity of ways and means of action and procedure. It may be such that the complete execution of it would involve the commission of more than one criminal offense. Mere details may be changed and the scheme remain the same." *Mansfield* v. *United States*, 155 F. 2d 952 (5 Cir. 1946). Whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement. There was ample evidence here to justify a finding that the non-broker defendants were a part of an overall scheme to acquire and exploit a public corporation—for the ultimate purpose of selling to the public unregistered common stock. See Developments—Criminal Conspiracy, 72 Harv. L. Rev. 920, 929-30, 933 (1959); Note Federal Treatment of Multiple Conspiracies, 57 Colum. L. Rev. 387, 393 (1957).

Mittelman's claim of duplicity in Count Two founders on the very nature of the mail fraud offense—with its atten-

dant "scheme or artifice," 18 U. S. C. §1341. The government, in presenting its case, must of necessity offer evidence as to the acts of the defendants which make up the relevant scheme. Aside from the Count One takeover transaction, the government's proof in this case showed (together with acts which were, aside from the scheme, innocent) any number of separate "crimes" under state or federal law. It is difficult to see how the common law duplicity doctrine can retain any meaning or vigor within the context of this particular statutory offense.[27] As long as the defendants clearly are "charged" with only one offense (i.e., the mailing in furtherance of the scheme), the count is not duplicitous. *See Queens* v. *United States*, 221 F. 2d 351 (5 Cir. 1955); *Weiss* v. *United States*, 122 F. 2d 675, 680 (5 Cir. 1941); *United States* v. *McAlpine*, 129 F. 2d 737 (7 Cir. 1942).

The fact that Mittelman was not named as a defendant in Count One—while the takeover fraud was pleaded as part of the Count Two scheme—does not make these two counts repugnant. The takeover scheme charged in the first count was a localized, short lived offense completed in September of 1955. The "grand scheme" charged in Counts 2-32 was of much longer duration and encompassed a much broader scope of activity—including the acquisition of control of a publicly held corporation. The fact that the government did not charge Mittelman with direct criminal responsibility, as a principal or otherwise, for the takeover of Texas-Adams does not prevent it from accusing him of knowing participation in the larger scheme, which took in many acts for which he may not have been *directly* responsible.

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27 This, of course, does not mean that the government is free to offer evidence of other unrelated "crimes" under the guise of the "scheme or artifice" of the mail fraud offense.

V. *Rulings on Evidence*

Considering the length and difficult nature of the trial, appellants press surprisingly few claims of error concerning disputed rulings on evidence. Mittelman complains that evidence of the takeover fraud was erroneously admitted against himself and Meredith who were not named in the first count; he further claims error in the admission of the testimony of Holland, Carroll, Sanders and Zavoico concerning the period of the Homestead-Ajax negotiations before the McCarthy group gained control of Texas-Adams. Pettit asserts the court erred in allowing in, against himself, a letter addressed to Jannis by Crosby—and also claims that evidence concerning money paid by Texas-Adams to the Worth Investment Co., of which Pettit was an officer, was inadmissible.

Mittelman's argument concerning the evidence of the fraud in the acquisition of control of Texas-Adams is disposed of by our prior discussion of the interrelationship of Counts One and Two. The pre-Texas-Adams transactions, although not pleaded in the indictment, were relevant in several respects. The evidence showed an early connection not only with McCarthy but also with Crosby; it indicated the known falsity of one of Mittelman's opinion letters written to cover stock issued to Jannis; it was relevant to the question of Mittelman's knowledge of the falsity of the representation, in the Texas-Adams "Report to the Stockholders," that Homestead had a $140,000 treasury at the time of the merger. In some aspects the testimony, especially a charge by Holland that Mittelman had apparently failed to return $19,000 of Homestead funds, was quite prejudicial and might have been excluded; as it was relevant to important aspects of the case, however, the court acted within its discretion in admitting it

Pettit's objection to the Crosby-Jannis letter, which cited Crosby, McCarthy, Mittelman and Pettit as principals for whom Jannis had acted as nominee, is without merit. When admitted, although he allowed it only against Crosby, Judge MacMahon rather ambiguously told the jury that later on, if the conspiracy was sufficiently established, it could be considered against other defendants. Defendant did not object to this. Any possible prejudice in connection with the original instruction was cured in the court's charge, wherein the jury was specifically instructed that "it is evidence against Crosby only and may not be considered by you against any other defendant."

The Worth Investment Co. was a corporation organized in Colorado by McCarthy, Pettit and Thomas Hudson, the Denver attorney and co-conspirator who most of the present defendants contend was, with McCarthy, the moving force in Texas-Adams. Worth was organized to finance conditional sales contracts for a vending machine company in which Hudson was somehow interested. The damaging aspect of this evidence was that $50,000 of Texas-Adams funds were sent west to finance the Worth Investment operations. The Worth Investment Co. episode was not pleaded in the indictment and Pettit claims it was wholly irrelevant and prejudicial as proof of another crime.

The evidence was properly admitted. Proof of personal use of Texas-Adams funds was highly relevant to the issue of criminal intent and knowing complicity in the fraud and conspiracy. It is somewhat ironic that while Pettit spends a considerable portion of his brief arguing the alleged fact that there is no evidence that he personally gained at the expense of Texas-Adams shareholders, he at the same time asserts that evidence showing use of $50,000 of Texas-Adams funds to finance outside personal business interests is irrelevant.

VI. *The Charge to the Jury*

The challenged portions of the charge include that concerning the Worth Investment Co. and the instructions on the proper weight to be given Mittelman's character evidence.

After reciting to the jury its recollection of the facts surrounding the Worth Investment episode, the court instructed the jury thus:

> "If you find, beyond a reasonable doubt, that one of the defendants, while an officer or director of Texas-Adams, caused or planned to cause, money, stock or other property belonging to the corporation to be paid to him, to his fellow officers or directors, or to a private corporation belonging to him or them with intent to benefit himself, and with knowledge that the corporation was not receiving, or would not receive fair return for what it would pay out, you may conclude that he violated his trust and committed a fraud."

As has been noted, the indictment did not specifically charge any of the defendants with criminal liability on account of the Worth transaction; the evidence was properly admitted as relevant to criminal intent. Upon this formulation, we think the trial court's charge was somewhat ambiguous in failing to delineate clearly the thrust and purpose of the Worth Investment evidence. The jurors should have been instructed that if they found the circumstances of the $50,000 transfer to Worth to have been fraudulent, they could then weigh that fact when considering the good or bad faith of the defendants involved concerning the actual crimes specifically charged in the indictment.

The lower court's failure to clarify completely the role of the Worth evidence cannot, however, be deemed cause

for reversal. The infirmity pointed to is encompassed in one sentence of an eight hour charge. It is important to note that the jury was not told it could convict on the basis of the Worth evidence—merely that "(y)ou may conclude that he violated his trust and committed a fraud," a proposition which is technically correct. Elsewhere in its charge, the court spelled out in detail the necessary elements for conviction on the mail fraud counts—presence of the scheme to defraud, the need to establish the complicity of each defendant with independent evidence, and the use of the mails. The court was similarly thorough on the Securities Act counts and the conspiracy. The error here was one merely of form and cannot be deemed prejudicial.

Appellant Mittelman's attack on the charge as to character evidence, noted in the margin,[28] is without merit. Whatever the validity of the traditional distinction, the court correctly instructed the jury on the role of character evidence as going to prove community attitudes rather than per-

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28 "There has been testimony as to the previous good character of the defendant Mittelman. You should consider such evidence of good character, together with all the other facts and all the other evidence in determining his guilt or innocence. Evidence of good character may, in itself, create a reasonable doubt where, without such evidence, no reasonable doubt would exist.

"But if from all the evidence you are satisfied beyond a reasonable doubt that Mittelman is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit him merely because you believe that he has been a person of good repute.

"It may be that those with whom he had come in contact previously have been misled, or that he did not reveal to them his real character or acts.

"The testimony of a character witness is not to be regarded by you as expressing the witness' personal opinion of Mittelman's character, nor is it to be taken by you as the witness' opinion as to his guilt or innocence.

"The guilt or innocence of Mittelman is for you, and you alone, to determine."

sonal belief. Finally, the appellant attempts to isolate a single sentence of the charge as incorrectly stating the law: "But if from *all the evidence* you are satisfied beyond a reasonable doubt that Mittelman is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit him merely because you believe he has been a person of good repute." When read alone, this sentence would appear to be a questionable statement of the role of character evidence in the jury's deliberation and might call for reversal. *Searway* v. *United States*, 184 Fed. 716 (8 Cir. 1910); *United States* v. *Klass*, 166 F. 2d 373 (3 Cir. 1948). In the paragraph immediately preceding this statement, however, the jury was clearly instructed that it should consider evidence of good character, together with all other evidence, in determining whether guilt had been proven beyond a reasonable doubt. The court further specifically told the jury that evidence of good character, alone, may create a reasonable doubt. In this context, it is clear that the court's reference to "all the evidence" in the challenged sentence *included* the evidence of good reputation—and that appellant's cited cases, *supra*, are inapplicable.

VII. *McCarthy's Guilty Plea*

All of the appellants assert the trial court erred prejudicially in failing to grant motions for a mistrial when co-defendant McCarthy pleaded guilty toward the end of the first week of trial. The change of plea was accepted out of the presence of the jury; because counsel for most of the defendants felt a cautionary instruction would only serve to call the jury's attention to—and emphasize—the guilty plea, the court did not inform the jury of the circumstances concerning McCarthy's subsequent absence from the case and courtroom. The court did, however, charge

them at length concerning the proper means of individually determining the guilt or innocence of each defendant.

Three weeks after the jury returned with its verdict attorney Garlock, counsel for Mittelman, moved for a new trial, which motion was joined in by other defendants, on the strength of affidavits executed by Mr. Garlock and his wife. The affidavits asserted that the Garlocks had encountered by chance, four days after the conclusion of the trial, one of the jurors in the case. The juror allegedly told the attorney that the jury had heard radio accounts and had read newspaper reports of the guilty plea; that said newspapers were brought into the jury room where they were discussed by members of the panel; and that the juror ventured the opinion that McCarthy's plea "in effect said that the other defendants were also guilty." The court denied the motions for a new trial and also declined to hold a hearing to question the jurors concerning the effect on their decision of the change in plea.

It was not error to refuse to grant a mistrial when McCarthy pleaded guilty. Certainly the guilty plea cannot be used as evidence against the remaining defendants, *Babb v. United States*, 218 F. 2d 538 (5 Cir. 1955); *United States* v. *Hall*, 178 F. 2d 853 (2 Cir. 1950); *United States* v. *Toner*, 173 F. 2d 140 (3 Cir. 1949); but see *Grunberg* v. *United States*, 145 Fed. 81, 86 (1 Cir. 1906). But the federal courts have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered. *Wood* v. *United States*, 279 F. 2d 359 (8 Cir. 1960); *Davenport* v. *United States*, 260 F. 2d 591 (9 Cir. 1958); *Richards* v. *United States*, 193 F. 2d 554 (10 Cir. 1951); *Schliefer* v. *United States*, 288 Fed. 368 (3 Cir. 1923). Appellants attempt to distinguish these cases on the strength of McCarthy's counsel's strong opening to the jury and becau-

McCarthy "held himself out" as innocent at the start of trial. Such a distinction is meaningless; all defendants who start trial "hold themselves out" as innocent and the fervor or effectiveness of an opening statement cannot call for a different result. As in *United States* v. *Falcone*, 109 F. 2d 579, 582 (2 Cir. 1940), "The existence of some kind of conspiracy was proved beyond peradventure, and the only important issue was whether these appellants were connected with the enterprise." The appellants' presentation of their cases, generally heaping all possible blame on McCarthy, strongly supports the thesis that there was no resultant prejudice from the change of plea.

The question raised by the denial of defendants' motion for a new trial based on the jury's knowledge and use of news accounts of the McCarthy plea is more difficult. Despite Lord Mansfield's original flat prohibition of impeachment by jurors of their verdict, *Vaise* v. *Delaval*, 1 T. R. 11, 99 E. R. 944 (K. B. 1785), the government properly concedes that there is no bar to admitting jury testimony to prove the fact they read the newspaper, *Mattox* v. *United States*, 146 U. S. 140 (1892). But it seriously contends we cannot consider testimony by jurors as to the actual effect the papers had on their decision, if any, and that this distinction is in accord with the opinion in *Mattox*. *McDonald* v. *Pless*, 238 U. S. 264 (1914), expressed a still more hostile attitude toward the admission of jury testimony to impeach verdicts, barring not only testimony as to matters solely within the knowledge of each individual juror but also matters known to the jury in common but not to outsiders, such as the fact that their verdict was reached by averaging the damage awards each thought proper. The Court had earlier stated, in *Hyde* v. *United States*, 225 U. S. 347, 384 (1912), that jurors will not be heard on matters of impeachment provable solely by their own testimony and not subject to corroboration. *McDonald*

and *Hyde* were cited with approval by the Supreme Court as late as 1953, *Stein* v. *New York*, 346 U. S. 156, 178, for the statement that jurors will not be heard to testify their verdict was a compromise.

In *Jorgensen* v. *York Ice Machinery Corp.*, 160 F. 2d 432 (2 Cir. 1947), this court indicated doubt as to the rule against impeachment and placed its decision sustaining a verdict which affidavits asserted to have been reached by majority vote in order to permit the foreman to go home in a family crisis, rather on the ground that the irregularity was not such as to call for upsetting the verdict. But we have since refused to hear jurors' testimony that they relied on legal knowledge imparted to them in another case, *Rotondo* v. *Isthmian S.S. Co.*, 243 F. 2d 581 (1957). We there stated the rule as permitting testimony that evidence reached the jury outside court, but as excluding testimony as to "the reasons that in fact induced them to find their verdict." 243 F. 2d 581, at 583.

The juror's testimony that he interpreted McCarthy's plea as implicating the remaining defendants and that the verdict was influenced in fact would thus not be admissible. This is what *Mattox* stated; it is what we held in *Rotondo*. *Marshall* v. *United States*, 360 U. S. 310 (1959), is no authority to the contrary. There the trial judge before verdict polled the jury to obtain assurance they would not be influenced by the offending news article; the Supreme Court did not order a second inquiry after verdict but decided the matter was of a nature too inflammatory not to have affected the jury. In *Kroomann* v. *United States*, 225 F. 2d 220 (6 Cir. 1955), a new trial was ordered, in part because the judge had reread to the entire jury an offending headline without quizzing them all as to whether it would affect them, but the events occurred before verdict rather than after. Even Wigmore, one of the *McDonald* rule's sharpest critics, who would permit jury testimony to attack com-

promise and quotient verdicts as well as to note extraneous influences, and would also permit asking the jury about probable effects before verdict, 8 Wigmore on Evidence §2350, draws the line on post-verdict motive testimony by jurors; he would invoke the parol evidence rule to exclude such inquiry, 8 Wigmore on Evidence §2349.

There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain. Whenever information erroneously reaches the ears of the jury in open court, the judge's instruction to disregard it may be disobeyed; yet it is not suggested that in such a case the jury ought be polled as to whether any of them relied on the forbidden knowledge. Even though presumably the jurors themselves know best, the question is determined, as is the question whether an error was prejudicial, on the basis of the nature of the matter and its probable effect on a hypothetical average jury. The same reasons apply when the improper knowledge reached the jury outside the courtroom. It was not error to refuse to examine the jurors as to their mental processes.

Stripped of the offered proof that the jury erroneously considered McCarthy's guilt as indicative of the guilt of the others, the question presented is virtually the same as on the motion for a mistrial. We assume that *Mattox* v. *United States*, *supra*, makes admissible the statement that the jurors read in the newspapers the accounts of the McCarthy plea. The unanimous Circuit Court authority that such a plea may be accepted in open court is implicit recognition, however, that the probable effect on the jury of such knowledge is not sufficiently harmful to require a new trial;

we agree. The situation here presented is a far cry from the infinitely more damaging information obtained by the jury in *Marshall* (defendant's own prior felony conviction) or in *Mattox* (two previous murders by the defendant; newspaper stated that the evidence was so conclusive that even the defendant's family had given up hope). Proper cautionary instructions were here given; the existence of the conspiracy itself was overwhelmingly proven; defendants at trial strove mightily to put *all* blame on McCarthy's shoulders; and, finally, the fact that two of the defendants were acquitted weighs against the conclusion that the jury was prejudicially affected.

VIII. *The Jencks Act Claim*

All of the appellants have joined in defendant Crosby's contention that the cross-examination of numerous government witnesses may have been unduly restricted because of the trial court's refusal to order produced for defense counsel certain "witness sheets" [29] and notes of interviews conducted by the two Assistant United States Attorneys who prosecuted the defendants. When demand was first made for these papers, the Court, in accordance with the procedure prescribed by the Supreme Court in *Campbell v. United States*, 365 U. S. 85 (1961), had both prosecutors take the stand; an extensive voir dire was held looking into the circumstances under which the notes were taken and the subsequent "witness sheets" prepared to determine whether the statements in question were "substan-

29 According to testimony given by the two Assistant United States Attorneys who tried the case for the government, handwritten notes were first taken of interviews with various witnesses. Afterward, typed "witness sheets" were prepared; although the notes were used as a base, often much of the notes was excised and other information and cross references to exhibits were added to result in a "final" of the direct examination of government witnesses.

tially verbatim." 18 U. S. C. §3500; *Palmero* v. *United States*, 360 U. S. 343 (1959). The Court decided that question in the negative and denied production to defense counsel; the notes and sheets were marked as Court Exhibits and were made part of the record on appeal.

The Supreme Court in *Palmero* held that in the light of both the language of the Jencks Act and its legislative history Congress had looked to the production of "only those statements which could properly be called the witness' own words," and which "reflect fully and fairly" what was said; a principal fear evinced was that of the distortion inherent in selective summaries and statements taken out of context. Finally, the Court stated that, within the Congressional framework, the "final decision as to production must rest • • • within the good sense and experience of the district judge • • • subject to the appropriately limited review of appellate courts." 360 U. S. 343, at 353.

With the *Palermo* case as a guide, inspection of the notes and "witness sheets," and a perusal of the voir dire examination of the government attorneys, make it clear that the trial court did not err in denying production. The prosecutors testified that there had been omissions in the taking of notes—that often no notes were taken for long periods of the interviews. They added there was no attempt to use the witnesses' own words; rather that these notes and jottings were prepared for the purpose of providing a general framework of reference from which this long and complicated case could be presented. They repeatedly answered in the negative the query whether the notes were verbatim. They testified that they made constant additions, interpolations and interpretative asides along with fragmentary recordations of the witnesses' stories.

The notes and sheets largely bear out the testimony of the United States Attorneys. The witness sheets prepared

from the handwritten notes are not reports of interviews, much less substantially verbatim ones. They have all the appearance of being plans for the conduct of examination of witnesses at trial. Many are divided into topics by headings preceding sentence fragments to indicate the expected testimony of the witness; others are made into more complete sentences, separately stated to make the individual points desired to be elicited. In no sense can they be said to be "the witness' own words" or "continuous, narrative statements." Moreover, most of them contain material clearly not elicited from witnesses during the interview. Finally, the fact that the sheets were not prepared contemporaneously with the interviews, in conjunction with the testimony that they and the notes were far from identical, might alone warrant refusal to order production.

The case for production of the notes themselves is little stronger. Notes of interviews with many witnesses had been destroyed prior to trial; the prosecutors testified that this had been done in good faith, with no thought of subverting the Jencks Act, to prevent cluttering of files after the typewritten witness sheets had been prepared. See *United States* v. *Thomas*, 282 F. 2d 191 (2 Cir. 1960). They also stated that the remaining notes were substantially identical in form to those that had been destroyed. The notes, of course, cannot definitely corroborate the testimony of the prosecutors that substantial gaps existed in the note taking. In other respects, however, the notes which remain do substantiate the testimony given on voir dire. Generally, they appear to be composed of fairly cryptic references to the highlights of the respective interviews —to be used as reminders at trial. Even the notes contain some matter extrinsic to the interviews, cross references to the introduction of documentary evidence, identification

of individual defendants, and occasional references to interrelationships with expected testimony of other witnesses. Finally, legislative history strongly indicates that one evil Congress sought to remedy in passing the Jencks Act was the possible production of notes made by government attorneys in preparing their case. 103 Cong. Rec. 15931 (1937) (Remarks of Senator Hruska); S. Rep. No. 981, U. S. Code Cong. & Adm. News, 85th Cong., 1st Sess., 1861, 1867.

IX *Other Contentions*

Some of appellants' other contentions may be dealt with summarily. Mittelman claims his Count Two conviction cannot stand because it is completely inconsistent with the jury's acquittal of him on Count Twelve. It is by now well settled, however, that "consistency in the verdict is not essential," *Dunn* v. *United States*, 284 U. S. 390, 393 (1931); *Steckler* v. *United States*, 7 F. 2d 59, 60 (2 Cir. 1925); defendant's attempt to distinguish these landmark decisions, and a host of other Federal cases, is completely without support in logic or precedent. Mittelman also claims that the "public offering" exemption incorporated into the criminal provision of the Securities Act is so amorphous as to make the criminal statute unconstitutionally vague—and that the Court below erred in its charge to the jury concerning the applicability of that exemption. While the term "public offering" in the statute alone might possibly be open to an attack on grounds of vagueness, the judicial gloss placed on this legislation by the Supreme Court in *S.E.C.* v. *Ralston Purina Co.*, 346 U. S. 119 (1953), two years before the acts here charged, cured any defect which might have existed. As for the correctness of the charge, the trial court adopted most of the very language of the Supreme Court in *Ralston Purina*. See also *Gilligan, Will*

& Co. v. *S.E.C.*, 267 F. 2d 461 (2 Cir. 1959), certiorari denied 361 U. S. 896. Any of the numerous arguments raised by the four appellants whose convictions we are affirming not specifically answered in this opinion, are either totally lacking in merit or inapplicable to them.

The judgments of conviction of defendants Crosby, Meredith, Mittelman and Pettit are affirmed. The convictions of Goldberg, Gordon, Reicher and Philip Gordon & Co. are reversed and as to them the indictment is dismissed.

Opinion Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCIS PETER CROSBY, J. LEONARD GOLDBERG, PHILIP GORDON, EUGENE MEREDITH, LEO B. MITTELMAN, WORTH PETTIT, JR., PAUL REICHER and PHILIP GORDON & COMPANY INC.,

Defendants-Appellants.

PETITIONS OF APPELLANTS MITTELMAN, MEREDITH AND PETTIT FOR REHEARING

Per Curiam:

The petitions for rehearing of appellants Mittelman, Meredith and Pettit are denied.

The following corrections may be made in the opinion:

On page 2686 of the slip opinion, line 15, strike out "They told Holland" and insert in place thereof "McCarthy told Holland".

On page 2697 of the slip opinion, last line of text, strike out "Any conclusion of Mittelman's innocence" and insert

in place thereof "Any conclusion that the jury was mistaken in finding Mittelman's guilt established beyond a reasonable doubt."

On page 2715 of the slip opinion, line 2, strike out ", Mittelman".

H. J. F.
U. S. C. J.

J. J. S.
U. S. C. J.

H. E. W.
U. S. D. J.

6 November 1961

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of August, one thousand nine hundred and sixty one.

Present:

HON. HENRY J. FRIENDLY
HON. J. JOSEPH SMITH,
Circuit Judges,

HON. HARRY E. WATKINS,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

LEO B. MITTELMAN, *et al.*,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court as to appellants Francis Peter Crosby, Eugene Meredith, Leo B. Mittelman, and Worth Pettit, Jr. be and they hereby are affirmed.

Further ordered, adjudged and decreed that the judgments of said District Court as to J. Leonard Goldberg, Philip Gordon, Paul Reicher and Philip Gordon & Company, Inc. be and they hereby are reversed and as to them the indictment is dismissed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk